Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From January 1, 1959

Through March 31, 1959

VOLUME 94

MacDONALD GALLION, Attorney General

1960

QUARTERLY REPORT

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ATTORNEY GENERAL

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1959, through March 31, 1959, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

MacDONALD GALLION,
Attorney General,

MACDONALD GALLION
Attorney General

EDWIN STRICKLAND
Administrative Assistant

Assistant Attorneys General

WILLARD W. LIVINGSTON
Senior Assistant

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Owen P. Bridges
David W. Clark
Jerry L. Coe
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George O. Miller, Jr.

Assistant Attorneys General Assigned to the Department of Conservation:

A. J. Harris
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Assistant Attorney General Assigned to the Department of Examiners and Public Accounts:

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William H. Burton, Jr.
Arthur Joe Grant
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James R. Payne
H. Grady Tiller

OPINIONS

January 12, 1959

Honorable Chester Walker
Judge of Probate
Tuscaloosa County
Tuscaloosa, Alabama

Insane Persons—Judges of Probate—Sheriffs

The Judge of Probate of the County of the residence of an insane person, who has been released "on trial" under the provisions of Title 45, Section 219, Alabama Code 1940, has the duty to "depute one or more persons, relatives, friends, or officers, as he may see fit" under the provisions of Title 45, Section 211, Alabama Code 1940 to convey said insane person back to the hospital for the insane in the event that it is necessary to return the "on trial" patient to the hospital within six months of the patient's release, and if requested to do so by the person in custody of said insane patient.

Opinion by Assistant Attorney General Younger.

Dear Sir:

Your request for an official opinion bearing date of December 9, 1958 is as follows:

"From time to time patients are released from the Alabama State State Hospitals 'on trial' under the provisions of Section 219, Title 45, Code of Alabama 1940. This statute contains the following provision:

> 'Patients 'on trial' may be returned, if necessary, any time within six months, without additional committing papers.'

"Some question has arisen as to the proper procedure in handling a patient whose family or friends, to whom he has been furloughed, desire that he be returned. For instance, the Sheriff of Tuscaloosa County is often called upon by relatives or friends of the furloughed patient to return him or her to the hospital at Mount Vernon, Alabama. Section 211, Title 45, Code of Alabama of 1940, provides that the Judge of Probate 'shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital.' However, we do not know whether this provision is applicable to the return of patients under the provisions of Section 219. "Furthermore, the Judge of Probate is not ordinarily informed by the Alabama State Hospitals authorities that a patient has been furloughed or placed 'on trial.'

"We would, therefore, appreciate your answering the following question for us:

"1. What duty does the Probate Judge or Sheriff have in connection with the return of patients to insane hospitals who have been released 'on trial' and who have not remained away from the hospital more than six months?

"2. In the event that you state that the Probate Judge or Sheriff have duties in this connection, please set forth the procedure which either or both of them should follow in connection with the taking custody of such furloughed patients and returning the same to the appropriate hospital."

The answer to your first question is that the Judge of Probate of the county of the residence of an insane person, who has been released "on trial" under the provisions of Title 45, Section 219, Alabama Code 1940, and who has not remained away from the hospital more than six months has the duty to "depute one or more persons, relatives, friends, or officers, as he may see fit" under the provisions of Title 45, Section 211, Alabama Code 1940, to convey such insane person back to the hospital for the insane if the Judge of Probate is so requested by the person having custody of said insane person.

The answer to your second question is that the procedure to be followed by the Judge of Probate and the person deputed by the Judge of Probate under the provisions of Section 211, supra, which could be the Sheriff, is the same as that upon first sending the insane person to the state hospital for the insane, except that it is not necessary to again go through the commitment process.

I find no opinions of the Attorney General or cases dealing with these specific questions. Title 45, Section 219, Alabama Code 1940, provides that the physicians of the hospitals for the insane may authorize the release of patients either by "discharge" or on an "on trial" basis. This particular statute further provides that the patient released "on trial" may be returned, if necessary, any time within six months without additional commitment papers whereas those patients "discharged" or remaining away from the hospital for more than six months, must be recommitted before they can be returned to the hospital. As I understand your problem, the persons with whom we are concerned fall within the "on trial" category and it became necessary to return such persons to the hospital prior to the expiration of the six-month period and, hence, there is no legal process of recommitment necessary.

Title 45, Section 211, Alabama Code 1940, requires the Judge of Probate to depute "one or more persons, relatives, friends, or officers, as he may see fit" to convey the patient to the hospital for the insane. As I read this statute it makes no distinction between the conditions under which the patient is conveyed, that is, whether he is being committed originally, being recommitted after discharge, or is being returned from

an "on trial" furlough. I am, therefore, of the opinion that the Judge of Probate, if application or request is made to him, has the same duty in returning an "on trial" patient to the hospital for the insane as he has in originally sending such a patient to such hospital. Such would be true even though under the circumstances it was not again necessary by legal process to commit such patient to the hospital for the insane.

The above interpretation of Title 45, Sections 211, and 219 is in ac cordance with the interpretation placed upon said statutes by the Departments of Examiners of Public Accounts. A strong presumption exists as to the correctness of the construction placed on statutes by the officers authorized to construe and administer the law where such construction has been followed for a long time.—**Glencoe Paving Co. v. Graves**, 266 Ala. 154, 94 So. 2d 872; **Ex parte Darnell**, 262 Ala. 71, 76 So. 2d 770.

Very truly yours,

JOHN PATTERSON
Attorney General

January 12, 1959

Hon. J. A. Logue
Chairman, Houston County
Board of Revenue and Control
Dothan, Alabama

Counties—Gasoline and Gasoline Tax—Gasoline Fund—Highways and Highway Department—Prisons and Prisoners

Reasonable costs of transportation, guards and minor supplies of convicts while actually engaged in work on the county road system may be paid from the gasoline funds. Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of December 31, 1958, is as follows:

"During the 1957 session of the Legislature, Act No. 61 was passed which provided among other things for prisoners to be sentenced to hard labor for the County. In complying with this Act there are certain expenses which will be incurred, such as clothing, transportation, guards and minor supplies. Since these prisoners will be employed to work on the County road system we would appreciate your opinion if these expenses which will be incurred in connection with the

County convict system may legally be paid from the gasoline fund of the County."

This office has in the past held that any expense necessary to the construction, maintenance and improvement of public roads by the counties may be paid from the gasoline funds, such as clerical help for the superintendent of roads and a road foreman (Biennial Report of Attorney General 1936-38, page 465), pay roll clerk necessary to the construction, maintenance and improvement of public roads (Biennial report of Attorney General 1936-38, page 707), the purchase of a gravel pit in order to cut costs of gravel to be used on the public road (Biennial Report of Attorney General, 1932-34, page 249), and reasonable attorney fees in the acquisition of the right of way, which was a necessary incidental expense to acquiring the right of way for a public road (Biennial Report of Attorney General, 1936-38, page 489).

However, it has also been held that a county may not expend the gasoline fund to support something which is otherwise provided for by other funds. See Biennial Report of Attorney General, 1936-38, page 465, and **Weaver V. Tidwell,** 228 Ala. 169; 153 So. 218.

It is, therefore, my opinion that reasonable costs of transportation, guards, and minor supplies of convicts while actually engaged in work on the county road system may be paid from the gasoline funds. Costs of guards, clothing, medical attention, bedding and food while housed in the county jail, however, are provided for under Title 45, Sections 124, 125, and 144 (as amended), Code of Alabama 1940 and may not, in my opinion, be paid from the gasoline tax. Biennial Report of Attorney General, 1936-38, page 465, and **Weaver V. Tidwell,** 228 Ala. 169; 153 So. 218.

Very truly yours,
JOHN PATTERSON
Attorney General

January 14, 1959

Hon. George T. Morris
Mayor
City of Anniston
Anniston, Alabama

Municipalities- Counties-
Contracts.

A municipality may join with the county and contract with a private enterprise for an industrial survey and a critical a-analysis of the community as a step toward obtaining industries.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion bearing date of December 19, 1958, is as follows:

"The Chamber of Commerce of the City of Anniston, Alabama, has furnished the City of Anniston, with the following information on Fantus Area Research, Incorporated, to-wit:

" 'Fantus Area Research, Incorporated, Empire State Building, New York City, New York, is an affiliate of Fantus Factory Locating Service, same address. Mr. Leonard C. Yaseen is President of both organizations.

" 'Fantus has been in operation for more than thirty years, serving industrial clients in the matter of locating plant sites for them in every State in the nation. They have located more than 1400 major plants over a thirty year span, more than has any other similar organization. They are recognized as the leading industrial development organization in the United States.

" 'Now, during the past two years, they have been offering the services of their organization to the various cities of the nation, using the vast storehouse of knowledge and experience which they have gained through working with thousands of industrial enterprises. They offer to furnish a complete analysis of any city or community in order to determine what specific type of industry would be likely to operate profitably in that community. They also include a critical analysis of the community, pointing out items which should be corrected if the community is to compete for new industry, and further furnish a list of the so-called 'growth' industries in the fields which are recommended for the community, so that a direct approach can be made.

" 'It is our understanding that in most cases where Santus has signed contracts for this survey, the cost of the survey has been shared by the city and county governments. The cost of the contract is regarded as the initial investment, since the program must be implemented once it is received if it is to be effective. Therefore, the local Chamber of Commerce usually agrees to implement the program over a given number of years, usually at a cost greatly exceeding the cost of the contract. Therefore, it becomes a joint operation of the city and county governments, and the local Chamber.'

"Said Chamber of Commerce has informed me that Fantus Area Research, Incorporated, is willing to enter a contract with the City of Anniston and Calhoun County, Alabama, jointly, to make the survey and analysis of the City of Anniston and that part of Calhoun County outside the City of Anniston but in relative close proximity to the City. The payment for said services rendered by Fantus Area Re-

search, Incorporated, is to be made jointly by the City of Anniston and the governing body of Calhoun County, Alabama.

" Please advise me whether the City of Anniston has the authority to enter into the proposed contract between it and Calhoun County, Alabama, and the said Fantus Area Research, Incorporated."

A municipality has certain inherent powers in regard to promoting its development and general welfare. Quarterly Report of Attorney General, Vol. 83, p. 11.

An industrial survey and a critical analysis of the community such as is contemplated by the City of Anniston and Calhoun County is a preliminary step incident to obtaining industries for the benefit of the municipality, thus promoting its development and general welfare.

Therefore, I am of the opinion that the City of Anniston has authority to join with Calhoun County in entering into the contract to which your request refers. Cf. **Fitts V. Commission of City of Birmingham et al.**, 224 Ala. 600, 141 So. 354, and Quarterly Report of Attorney General, Vol. 37, p. 79.

Very truly yours,

John Patterson
Attorney General

January 14, 1959

Honorable M. S. Butler
Sheriff
Montgomery County
Montgomery 2, Alabama

Exemptions—Property—Executions—Sheriffs.

Debtor's claim of exemption for personal property need be filed only if value thereof exceeds one thousand dollars.

Where value of debtor's personal property does not exceed one thousand dollars, claim of exemption attaches by operation of law.

Sheriff is without authority to levy against personal property under execution when value thereof does not exceed one thousand dollars.

Opinion by Assistant Attorney General Coe.

Dear Sir:

Your request for an official opinion bearing date of December 29, 1958 is as follows:

"Re; Exemptions-Personal Property under Executions.

"I am requesting an official opinion from your office in regard to above.

"My interpretation of Title 7, Section 629, Code of Alabama, 1940, of which there has been no changes in the Supplement, issued in 1955, is that after this office has diligently tried, and without any success, find that the Defendant in Execution, does not own any personal property in the excess of the $1,000.00 allowed him, there is nothing to levy upon to force payment of the Judgment.

"That, under Title 7, Section 633, sub-paragraph, 'SECTION APPLIES ONLY WHEN PROPERTY IN EXCESS OF EXEMPTION IS OWNED', I have interpreted that it means the **Defendant does not have to file his Plea of Exemption,** unless the property owned by him is in excess of the $1,000.00 allowed. That the Plea must be filed only in excess of this amount in order that he may set aside THE PIECES UPON WHICH THE SHERIFF TO LEVY UPON.

"I will appreciate you informing this office if the plaintiff's attorney can force this office to levy upon said property when the property is less than the $1,000.00 allowed him, even though the Defendant does not file his Plea of Exemption, on which the sub-paragraph states that he (Defendant) does not have to file same."

I am of the opinion that your interpretations of Title 7, Sections 629 and 633, Code of Alabama 1940 are correct to the letter.

Section 629 provides:

"The personal property of such resident, to the amount of one thousand dollars in value, to be selected by him, and, in addition thereto, all necessary and proper wearing apparel for himself and family, and all family portraits or pictures, and all books used in the family, shall also be exempt from levy and sale under execution or other process for the collection of debts.

Section 633 provides:

"Any resident of this state, entitled to, and desiring to claim a homestead or other exemption from levy and sale under execution or other process, may, at any time, make and file in the office of the judge of

probate of the county in which the property is situated, if a homestead, or if personal property, of the county in which such resident resides, a declaration in writing, subscribed and sworn to by him, describing the property selected and claimed by him as exempt, item by item, in case of personal property, with its value; and other declarations may, from time to time, as occasion may require, be made and filed."

A leading case on this point is **Alley vs. Daniel**, 75 Ala. 403, wherein the Supreme Court said:

"But if he (debtor) has not personal property, exceeding in value one thousand dollars, a selection is unnecessary; there is neither room nor reason for it. The law intervenes and attaches the right of exemption, without the doing of any act on his part; attaches the exemption as absolutely and unconditionally as if the particular property was specially designated and declared exempt . . . . "

It is my opinion that a lengthy discussion of your inquiry would serve no useful purpose in view of the above decision which has been applied consistently in the following cases:

May vs. Strickland, 235 Ala. 482, 180 So. 93

Majors vs. Killion, 230 Ala. 531, 162 So. 289

Kibbe vs. Scholes, 219 Ala. 571, 123 So. 61

Stephen vs. Putney Shoe Co. vs. White, 172 Ala. 89, 55 So. 503

Skinner vs. Jennings, 137 Ala. 295, 34 So. 622

Jackson vs. Wilson, 117 Ala. 432, 23 So. 521

Chandler vs. Chandler, 87 Ala. 300, 6 So. 153

Jarrell vs. Payne, 75 Ala. 577

Very truly yours,

JOHN PATTERSON
Attorney General

January 15, 1959

Honorable L. P. Waid, Jr.
Circuit Solicitor
30th Judicial Circuit
Oneonta, Alabama

Registers—St. Clair County—Opinions Overruled, Modified or Distinguished.

1. The Judge of the 30th Judicial Circuit has authority to appoint one register only for St. Clair County, Alabama.

2. The Register for St. Clair County, Alabama may maintain a branch office and appoint a deputy register therefor in Pell City, under the provisions of Title 13, Sections 212 and 217, Code of Alabama 1940, and Act No. 53, Local Acts 1907, page 61.

3. The opinion reported in Quarterly Report of Attorney General, Vol. 59, page 15, overruled.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of January 13, 1959, is as follows:

"As the incoming circuit judge of Saint Clair, shall I appoint one Register for the Circuit Court of Saint Clair County, or shall I appoint a Register for the Southern Judicial Division and another Register for the Northern Judicial Division of the County?

"Section 144 of the State Constitution states 'A circuit court . . . shall be held in each county . . .'

"In 1907 by a local act Saint Clair County was divided into two Judicial divisions, with a courthouse in each, and generally speaking, each division exercises complete jurisdiction over all matters as if each division was a separate county. However, the same officers serve each division. There is one probate judge, one county governing body, one county solicitor, one sheriff, one superintendent of education and one board of education, one clerk of the circuit court, one circuit judge and one circuit solicitor. Most of these officials have an office at one courthouse and a branch office at the other, with a deputy therein. I should add that there is only one tax assessor and one tax collector for the County, and each has an office in each courthouse.

"In 1915, when the legislature consolidated the old chancery courts with the circuit courts, it was provided 'There shall be a register of the circuit court of each county . . .' This same provision was re-enacted by the 1931 legislature (Act No. 29). Section 210 of Title 13 of the Code of 1940 provides also 'There shall be a register of the circuit court of each county . . .'

"In the case of Speer v. State, 27, Ala. App. 579, 177 So. 162, certiorari denied, 235 Ala. 46, 177 So. 167, it was held that there was but one grand jury in the county, and the Supreme Court, in answer to an inquiry from the Court of Appeals, said: 'The circuit court, whether it convened at Ashville or at Pell City, was the circuit court of St. Clair County. Const. 1901, No. 142.'

"On April 10, 1950, the then attorney-general ruled that the authorities (courts) 'treat the two Judical divisions "as distinct from each other as are the circuit courts of two different counties",' and that the circuit judge of the county has 'authority' to appoint two registers — one for the southern judicial division and one for the northern judicial division.

"The opinion of the Attorney-General quotes at length from the opinion of Judge Samford in the case of Speer v. State, supra, but after Judge Samford wrote his opinion at least one of his fellow judges on the Court of Appeals disagreed with him, and these judges certified the question to the Supreme Court. The Supreme Court, with no dissenting voices, disagreed with Judge Samford's views. Yet it is obviously Judge Samford's decision that Attorney-General Carmichael was following when he ruled or advised that there were two registers in Saint Clair County. (Page 15, Vol. 59, Opinions of Attorney-General)

"In my judgment, and in the judgment of the lawyers of Saint Clair County with whom I have discussed this, the opinion expressed by the Attorney-General on April 10, 1950, is wrong, and should be reversed by your office. It is our view that there is only one circuit court in Saint Clair County, and only one Register to be appointed.

"As the appointment (or appointments) must be made on January 20th, I will appreciate your immediate advice."

By Act No. 53, Local Acts 1907, Page 61, St. Clair County was divided into two judicial divisions, with a courthouse in each. Precincts Nos. 1, 2, 3, 4, 5, 6, 7, 8, 18, and 22 constituted the Northern Judicial Division; and precincts Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20 and 21 constituted the Southern Judicial Division. The above Act was approved February 21, 1907.

At the time Act No. 53, supra, was approved, the law provided a regis-

ter in chancery for each district to be appointed by the chancellor of the division in which such district was situate. Section 653, Code of Alabama 1896. See also Section 3070, Code of Alabama 1907.

The law now provides, "There shall be a register of the circuit court of each county to be appointed as follows: Where there is only one judge of the circuit, the register shall be appointed by such judge . . ." (Title 13, Section 210, Code of Alabama 1940.)

Act No. 53, supra, provided for one clerk only; one sheriff only and each was authorized to have a branch office at Pell City, the main office being for each in Ashville.

In my opinion, had the law been, when Act No. 53, supra, was approved, as it is now, namely a register for each county, the Legislature would have likewise provided a branch office for the register as it did for, the sheriff and clerk. At that time, however, as shown above, there was a register for each district and not for each county as it is now.

I am unable to find anywhere any authority for the appointment of two registers in St. Clair County except the opinion of this office reported in Quarterly Report of Attorney General, Vol. 59, page 15. Section 210, supra, provides for one register only for each county. Section 165, Constitution of 1901, provides that the clerk may, when appointed by the chancellor, also fill the office of register in chancery. As above pointed out, Act No. 53, supra, provided for one clerk only for both divisions in St. Clair County. The Supreme Court of Alabama has held that the Circuit Court, whether it convened at Ashville or at Pell City, was the Circuit Court of St. Clair County. Speer v. State, 27 Ala. App. 579, 177 So. 162; 235 Ala. 46, 177 So. 167.

These considerations lead me to the conclusion that the opinion reported in Vol. 59, supra, is in error and should be, and it is hereby overruled.

It is my further opinion that you, as Circuit Judge, should appoint only one Register for St. Clair County, who may, in my opinion, keep a branch office in Pell City with a deputy register in charge under the provisions of Title 13, Sections 212 and 217, Code of Alabama 1940, and Act No. 53, supra.

Yours very truly,

JOHN PATTERSON
Attorney General

January 16, 1959

Honorable W. B. Wise
Tax Assessor
Coffee County
Elba, Alabama

Taxation—Tax Assessors—Housing Authority—Condemnation.

The Elba Housing Authority having paid the amount of damages assessed into court in money, and having given a bond in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain, the appeal from the judgment of condemnation did not suspend the right of entry upon, and the taking of possession of the property condemned. Under such circumstances, the right and title in and to said property vested in said Elba Housing Authority, and as against intervening rights, relates back to the filing of the petition for condemnation, and the assessment of taxes is governed accordingly under facts in question.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion bearing date of January 6, 1959, is as follows:

"Under the provision of Chapter 2, Title 25, Code of Alabama 1940, as amended, the City of Elba has created the Elba Housing Authority. This Housing Authority, exercising the power of Eminent Domain as provided for in Title 25, Section 15, Code of Alabama 1940, filed a petition of condemnation on a tract of land within the corporate limits of the City of Elba, Alabama. This petition was filed with the Probate Court of Coffee County in April, 1958 and granted in August 1958. Subsequent to the granting of this petition, all but one of the land owners of the tracts condemned appeal the condemnation to the Circuit Court of Coffee County where the proceeding have not as of date reached trial. The housing authority has posted bond as required a part of the overall tract to be acquired by the Housing Authority has been purchased outright. A part of the tract to be condemned has been vacated by the original owners while a part of the condemned tract is still in possession of the original owners. Likewise, only a portion of the land of one owner is being taken while the remainder is not affected. Some of the landowners involved in the condemnation proceeding have been into my office and signed their tax assessments, others have made no assessments.

"My Questions are:

"1—Is the property being condemned by the Elba Housing Authority assessable to the owners while the condemnation proceeding await action of the Circuit Court of Coffee County?

"2—Would the fact that some of the original owners are still in possession of the land affect the assessment?

"3—Would the portion of land being taken from a large tract of one owner be deducted from that owner's entire tract before assessment?

"Your earliest consideration of these questions would be appreciated as my books must be closed by the third Monday in January 1959."

In answering these questions, it is necessary to give consideration to both the terms of the constitutional provisions (Sections 23 and 235), and to the statutory provisions which provide for the exercise of the right of eminent domain. Section 235 of the Constitution of 1901 provides as follows:

" . . . such appeal shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of the damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain; . . ."

Title 25 of the 1940 Code provides for municipal housing authorities, and Section 15 thereof confers upon such housing authorities the right of eminent domain. Said Section 15 providing as follows:

"The authority may exercise the power of eminent domain pursuant to the provisions of title 19."

Thereupon, the Court must order the same to be recorded and must make orders of condemnation in pursuance thereof upon the payment of the damages and compensation so assessed and reported or the deposit of the same in Court.

A consideration of Section 18 is also helpful. Said Section, as amended, (See Act No. 758, General Acts of 1953, Vol. II, p. 1020) and so far as here pertinent, reads as follows:

"JUDGMENT NOT SUSPENDED BY APPEAL IF DAMAGES PAID INTO COURT AND BOND GIVEN.—No appeal shall suspend the judgment, or deprive the applicant of the right of entry, provided the amount of the damages assessed for the parties who appeal or against whom an appeal is taken, shall have been paid into court in money,

and a bond shall have been given in double the amount of such damage, with good and sufficient sureties, to pay such damages as the property owners may sustain. Said amount of damages may be paid into court and said bond in double the amount of such damage, with good and sufficient sureties may be given at the time of taking the appeal or at any time thereafter that the applicant may desire the right of entry pending the appeal."

It will be noted that said Section clearly provides that "No appeal shall suspend the judgment, or deprive the applicant of the right of entry, provided the amount of the damages assessed for the parties who appeal or against whom an appeal is taken, shall have been paid into the court in money, and a bond shall have been given in double the amount of such damage, etc."

Said Section was declared constitutional. See Opinion of the Justices, 259 Ala. 524, 67 So. 2d 417.

Reference is made to Section 24 of Title 19, which governs the situation where an appeal is taken from the Probate Court to the Supreme Court.

You state in your facts that the housing authority has posted bond as required, but no statement is made that the housing authority has paid into the Court the award fixed by the Commissioners; but, since the one without the other would not have been effective to suspend the judgments, we are, for the purpose of this opinion, assuming that the award has been paid into the Court.

The conditions with respect to the payment of the award into Court in money and the giving of bond in double the amount of the damages having been met by the housing authority, it has a perfect right of entry and the taking over of the possession of the property condemned and, in view thereof, it is my opinion that the landowners would not be subject to assess the property in question for ad valorem taxation for the fiscal year October 1, 1958-September 30, 1959. It might well be said that the position of the landowners in this matter is comparable to that of the buyer of land under a bond for title where the buyer is given possession, under the bond, he is required to list the property for ad valorm taxation and pay the taxes assessed thereon. But for the fact that the housing authority in question is exempt from ad valorem taxation (See In Re: Opinion of the Justices, 179 So. Rep. 535,) it would be required to list the property in question for ad valorem taxation.

On the final determination of the proceeding now pending in the Circuit Court and the payment of the award to the landowners, the title acquired by the housing authority will relate back to the time of the filing of the condemnation petition. **Smith v. Jeffcoat**, 196 Ala. 96, 71 So. 717. It might also be said that the owner of the land in question merely retains title thereto as security and upon full payment being made therefor, the title to the lands will vest permanently in the housing authority.

In support of the foregoing, we respectfully refer you to the following:

29 C.J.S., Section 191, p. 1088 et seq. 18 Am. Jur., Sections 112 & 113, p. 738 et seq; Opinion of the Justices, 67 So. 2d 417; **Ex parte Lance, 103** So. 2d 753; **State v. Carter, 101 So. 2d 550; Cherokee Nation v. So. Kansas Railway Co., 135 U. S. 641, 10 S. Ct. 965; Rome & D. R. Co., et al v. Sibert, et al., 97 Ala. 393, 12 So. 69; Calhoun County v. Logan, 80 So.** 2d 529.

We are, therefore, at the following conclusions: Questions 1 and 2 are answered in the negative, and Question 3 is answered in the affirmative. This opinion is limited to facts under consideration and the assumptions made as to payment of the award.

Yours very truly,

JOHN PATTERSON
Attorney General

January 16, 1959

Hon. Robert Newman, Jr., President
Alabama Association of Circuit Court
Clerks and Registers
Troy, Alabama

Registers—Costs and Fees.

Act No. 742, Acts of Alabama 1957, Page 1171, approved September 23, 1957, as pertains to fees of registers for preparing transcripts on appeal and fees of registers in certain divorce cases discussed.

Opinion by Assistant Attorney General Coe.

Dear Sir:

Your request for an official opinion bearing date of November 28, 1958 is as follows:

"Title 11, Section 27, sets out the fees which the Registers are entitled to the next term of office. I would like an opinion on the following:

"1. Would not the Registers be entitled to receive .20 per 100 words for each copy of a transcript? The second item in the fees says copy of **bill or other paper, 100 words .20.** It seems that the register should be entitled to .20 per 100 words for any paper he has to copy and that he

would be entitled to .20 per 100 words for transcript and .20 per 100 words for each copy.

"2. Would the register be entitled to $12.00 or $20.00 in a divorce case in which the respondent was served? A good many times after the Sheriff serves the respondent, they will come in and sign an answer and waiver. It seems to me that the $12.00 fee would apply only to divorce cases in which the answer and waiver was filed the same time the bill was filed. The same thing would apply to a respondent served by registered mail."

Subject to the limitations set out below, I am of the opinion that your first inquiry must be answered in the negative.

Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 742, Acts of Alabama 1957, Page 1171, approved September 23, 1957, provides in part:

"Registers are entitled to the following fees for the following services:

"Filing bills or other paper ..... $.20

"Copy of bill or other paper, 100 words ..... .20

" . . .

"Transcript, per 100 words ..... .20

. . . . "

The only reasonable and logical deduction is that the second item, "Copy of bill or other paper, 100 words . . . $.20," refers to copies of bills and other similar or related papers that have been filed, and does not extend to copies of a transcript on appeal. That is, this item allows registers to charge twenty cents (20c) per 100 words for copying a bill or other paper which is on file in the Office of the Register and has no operation in regard to transcripts on appeal. This conclusion finds support in the fact that prior to the 1957 Amendment, registers were allowed a set fee of fifty cents (50c) for copies of each bill or other paper required by law to be filed. Thus, it is clear that the purpose of the item "Copy of bill or other paper, 100 words . . . $.20," in the above amendment is to allow registers to collect a total fee in comparison to the amount of work involved in copying a bill or other paper required by law to be filed and not be limited to a fee of fifty cents (50c) where certain bills or papers are unusually lengthy.

In construing the above section in the light of your inquiry, it is my opinion that said section authorizes a fee only for an original of a transcript, and that authority to charge for copies of the transcript must be found elsewhere. The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. (Title 11, Section 1, Code of Alabama 1940.)

Title 7, Section 768, Code of Alabama 1940 provides in part:

". . . The clerk, the register, or judge of probate, as the case may be, shall make out a transcript as required by law, and deliver the same to the appellant. He shall in making the transcript make a copy thereof for the appellee and deliver it to him or his attorney, and for the transcript he shall have fifteen cents for each one hundred words and for the copy five cents for each hundred words, both of which shall be taxed as costs against the unsuccessful party in the appeal. The appellant shall be entitled to procure a copy of said transcript by paying therefor at the rate of five cents for each one hundred words; provided the appellant make request of the clerk, register, or judge of probate before the preparation of the original transcript."

It should be noted that the above section provides for a fee of fifteen cents (15c) for each one hundred words for the original transcript and that Act No. 742, Acts of Alabama 1957, Page 1171, approved September 23, 1957, provides for a fee of twenty cents (20c) for each 100 words. However, this conflict may be resolved by reference to the principles of law announced in opinions of this office and by rulings of the Alabama Court of Appeals. These holdings are, in substance, that the latter enactment must prevail. Thus the fee for the original of a transcript is twenty cents (20c) per 100 words. See **Middleton v. General Water Works & Electric Corporation,** 25 Ala. App. 455, 140 So. 351; Quarterly Report of Attorney General, Volume 23, Page 25; Cf. Biennial Report of Attorney General, 1930-1932, Page 364.

Turning back to the fee for copies of the transcript, it is my opinion that Title 7, Section 768, Code of Alabama 1940 is the only authority therefor. Section 768, supra, provides a fee of five cents (5c) for each hundred words of a copy of the transcript going to the appellee and appellant. Thus you are advised that under the present law, you are authorized to charge the following fees in regard to transcripts:

Original transcript per 100 words ---------- $.20

Copy of transcript going to appellee, per 100 words ---------- .05

Copy of transcript going to appellant, per 100 words ---------- .05

You are reminded that Title 7, Section 771, Code of Alabama 1940 provides:

"The clerks of all courts from which an appeal lies to the supreme court or court of appeals, shall be required to make and keep on file in their office an exact copy of the record in all cases certified to said supreme court or court of appeals for use by the parties to such cases."

Under the present law I find no authority which provides a fee for the copy required by the above section.

I am mindful of the numerous opinions from this office that deal with inquiries similar to yours. However, these opinions deal with

specific phrases and provisions of prior legislative enactments, and with the exceptions of the general rules of law which are set forth—none of the prior opinions should control here.

Other fees provided in Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 742, Acts of Alabama 1957, Page 1171, approved September 23, 1957, are as follows:

"The following flat rate of fees will be charged on the following divorce cases:

"Answer and waiver divorce case, with two copies of decree ___$12.00

"Decree pro confesso on personal service, divorce case, with one copy of decree _____$20.00

"Decree pro confesso on registered mail service, divorce case with one copy of decree _____$20.00

"Decree pro confesso on publication, divorce case, with one copy of decree _____$20.00

In answer to your second inquiry, I am of the opinion that under Title 11, Section 27, Code of Alabama 1940, as amended by Act No. 742, Acts of Alabama 1957, Page 1171, approved September 23, 1957, the register is entitled to a fee of twenty dollars($20.00) in all divorce cases where the respondent has been served either by publication registered mail or by personal service and a decree pro confesso has been entered. The above Act clearly indicates that the register is entitled to a flat fee of twenty dollars ($20.00) in divorce cases upon the occurrence of two things:

1. Service by publication, registered mail or by personal service.

2. Entry of a decree pro confesso.

To entitle the register to a fee of twelve dollars ($12.00), I am of the opinion that the answer and waiver must be filed before service by any of the above means is had.

In proceedings other than divorce cases the register is allowed various fees for issuing a subpoena on bills, entering the return, making an order of publication, etc. which, in a divorce case is provided for by the flat fee of twenty dollars ($20.00) where service is had and a decree pro confesso entered, and the flat fee of twelve dollars ($12.00) where an answer and waiver is filed before service.

In those cases where a decree pro confesso is not entered, that is, if the respondent appear or contest the case after service, I am of the opinion that the flat rate schedule does not apply. The register's fee in such cases must be determined as in other proceedings in equity.

Very truly yours,

JOHN PATTERSON
Attorney General

January 22, 1959

Hon. N. Henry Byrd
Circuit Clerk and Register
Dale County Circuit Court
Ozark, Alabama

Clerks of Circuit Courts—Registers—Costs and Fees

1. Clerks of circuit courts are officers of the State or county within the meaning of Amendment XCII of the Constitution of Alabama 1901.

2. Registers of the circuit court are officers of the State or county within the meaning of Amendment XCII of the constitution of Alabama 1901.

3. Circuit clerks and registers serving an unexpired term are not entitled to receive fees under a new schedule enacted by the Legislature until the beginning of a new term by reason of Amendment XCII of the Constitution of Alabama 1901.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 1, 1958, is as follows:

"Could you please give me a ruling on the following situation:

"Article 21, 27, 87, 89, 89(2) of the 1957 Supplement of the Code of Alabama changes the Clerks and Registers fees at the expiration of the Term of the incumbent circuit clerk and register, etc.

"My problem is this: The incumbent Clerk and Register has resigned, effective October 1, 1958. Will I be serving out his term, or will I be beginning my tenure of office by filling out his term. (I was elected the new clerk and register.) If I am doing the latter, will the new fees go into effect on cases filed after October 1, 1958, or will the old fees be in effect until the beginning of my new term?"

Articles 21, 27, 87, 89, 89(2) of the 1957 Supplement of the Code of Alabama 1940 are references to the following acts of 1957:

Acts Nos. 740; 742; Section 2 of Act No. 741; Acts Nos. 543; 741.

These acts change the fees for clerks of circuit courts and registers and also change the fees for clerks of certain county courts, law and equity courts, or courts of like jurisdiction, where the clerk is ex officio clerk of such court.

With the exception of Act No. 742, supra, applying to fees of registers, each of the above enumerated acts contains a provision as follows:

"After its passage and approval this act shall become effective in each county at the expiration of the term of the incumbent circuit clerk and shall apply to or affect cases filed after such date."

Act No. 742, however, provides in Section 3 thereof that the act shall take effect immediately.

Apparently, you were serving the unexpired term of the office of clerk and register, the term of which ended at midnight on January 19, 1959. At that time a new term for clerk and register begins.

Amendment XCII of the Constitution of Alabama 1901, proclaimed ratified May 16, 1952, prohibits the changing of the salary, fees or other compensation of any officer of the State, or of any county of the State. This amendment further provides in part as follows:

"Nor shall the legislature or any county of the state increase or decrease, or authorize the increase or decease of, the salary, fees, or other compensation of any person filling an unexpired term in any such office during the remainder of such term, either before or after the appointment or election of such person to fill the unexpired term . . ."

Of course, the clerk of the circuit court and the register of the circuit court are officers of the State or county within the meaning of Amendment XCII, supra.

Therefore, the new fees provided for could not become effective until January 20, 1959. The old fees will be in effect until that time.

Very truly yours,

MacDONALD GALLION
Attorney General

January 26, 1959

Hon. Harry Haden
Commissioner of Revenue
State of Alabama
Montgomery 2, Alabama

Taxation—Use Tax—Revenue, Department of—Soldiers' and Sailors' Civil Relief Act.

1. Alabama use tax is not due with respect to motor vehicles purchased outside the State for use in Alabama by non-resident personnel of the military service stationed in Alabama in compliance with military or naval orders where the excise (sales or use) tax imposed by the state of domicile of such personnel has been paid.

2. Alabama use tax is not due with respect to tangible personal property other than motor vehicles purchased outside the State for use in Alabama by non-resident service personnel stationed in Alabama in compliance with military or naval orders.

Opinion by Assistant Attorney General Livingston

Dear Sir:

The request of your predecessor for an official opinion is as follows:

"Your official opinion is requested with respect to the following questions:

"1. Does the use tax levied by the provisions of Title 51, Section 788, as amended, Code of Alabama 1940, apply to purchases outside the State of Alabama for use in this State of motor vehicles by personnel of the military service who are stationed in Alabama solely by reason of military orders but whose domicile is that of another State.

"2. Is your answer to question 1 the same where the purchase is that of tangible personal property other than motor vehicles.

"3. If the use tax is applicable in either or both of the above situations, would it be due where the purchase is made by service personnel on leave in their home state but who are under orders to return to or come to Alabama upon termination of their leave?

"In connection with the above request, I call your attention to the provisions of the Soldiers and Sailors Civil Relief Act, Title 50, U.S.C.A. Appendix, section 574."

The answers to your questions depend upon an interpretation of the

provisions of law found in Title 50, Section 574, U.S.C.A., which provides as follows:

"§574. Residence for tax purposes

(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: **Provided**, That nothing contained in this section shall present taxation by any State, Territory, possession, or political subdivision of any foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: **Provided**, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid."

Section 574, **supra**, is the statute which was involved in the case of **Dameron v. Brodhead**, 345 U.S. 322, 73 S. Ct. 721, 32 A. L. R. 2d 612. In this case, the Supreme Court held that Federal legislation (50 U.S.C.A., Section 574) exempting service men from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service is a valid congressional exercise of a "necessary and proper" power supplementary to the power "to declare war" and "to raise and support armies." The Court also held that the Federal statute

which provides that personal property of service men shall not be deemed to have a situs for taxation in a state in which they may be required to be present by virtue of their service prevents such a state from imposing a tax on a serviceman's personal property within the state, irrespective of whether or not the state of his original residence has imposed a like tax.

Under Section 574, supra, particularly Subsection (2) thereof, it appears that taxation with respect to motor vehicles of service personnel is governed by specific provisions. This office has held, in view of Section 574(1), supra, that motor vehicles of non-resident personnel stationed in Alabama in compliance with military or naval orders are not subject to ad valorem tax even though an Alabama license tag for such vehicle is purchased. Quarterly Report of the Attorney General, Vol. 81, Page 16. Under Section 574(1), supra, the situs of personal property (which includes motor vehicles) of non-resident service personnel is not in the State of Alabama and but for the proviso in Section 574(2), supra, no license, fee, or excise, imposed by the State of Alabama with respect to motor vehicles or the use thereof is due. However, under the proviso where the license, fee, or excise required by the State, Territory, possession or District of Columbia, of which the person stationed in Alabama is a resident or in which he is domiciled has not been paid, the license, fee, or excise imposed by the State of Alabama is due. The Alabama use tax is an excise tax. Title 51, Section 788, as amended, Code of Alabama 1940.

Therefore, in answer to your first question, it is my opinion that the State of Alabama may not collect a use tax with respect to motor vehicles purchased outside the State for use in Alabama by non-resident personnel of the military service stationed in Alabama solely by reason of military or naval orders where the excise (sales or use) tax imposed by the state of domicile of such personnel has been paid. If not paid to the state of domicile, the Alabama use tax is due. Section 574(2), supra, If no such tax is imposed by the state of domicile, no use tax is due the State of Alabama. Dameron v. Brodhead, supra.

With respect to question number 2, the personal property of non-resident service personnel stationed in Alabama in compliance with military or naval orders "shall not be deemed to be located or present in or to have a situs for taxation" in Alabama. Section 574(1), supra. As pointed out above, only motor vehicles are excepted. Section 574(2), supra. Therefore, it is my opinion that Alabama use tax is not due with respect to tangible personal property other than motor vehicles purchased outside of Alabama for use in Alabama by non-resident service personnel stationed in Alabama in compliance with military or naval orders.

In view of my answer to your second question, your third question can relate only to motor vehicles and is more a question of fact than law. In order to be subject to the use tax, the purchase out of this State of tangible personal property must be made for use, storage or consumption in this State. Where a non-resident member of the military service is

on leave but under orders to return to or report for duty in Alabama and purchases a motor vehicle which he brings to Alabama, it appears that such purchase was for use in Alabama within the meaning of Title 51, Section 788, as amended, Code of Alabama 1940, and would be subject to the use tax if otherwise due in accordance with my answer to question one. However, as stated above, the answer to your third question depends upon the facts and circumstances in each case.

Very truly yours,

MacDONALD GALLION
Attorney General

January 27, 1959

Honorable Robert Newman, President
Alabama Association of Circuit
Court Clerks and Registers
Troy, Alabama

Clerks of the Circuit Courts—Costs and Fees.

Act No. 542, Act No. 543, Act No. 741, Acts of 1957, pages 762 764, and 1170, respectively, relating to the costs and fees accruing to clerks of the circuit courts discussed generally.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of November 4, 1958, is as follows:

"I would like for you to give me an opinion on the things below pertaining to the clerk's fees which go into effect in January.

"1. In Title 11, Section 89. For each felony case where defendant pleads not guilty $18.00. For each felony case nol prossed or otherwise dismissed $10.00.

"If the defendant is tried and found not guilty would not the clerk be entitled to $18.00 out of the General Fund or Fine and Forfeiture fund, which ever is applicable, rather than $10.00 as the case was not nol prossed or dismissed.

"2. For each conditional judgment on a forfeiture set aside on payment of cost $6.00; for each case after final judgment $7.00. Would not

the clerk be entitled to either of the two in addition to the other fees? That is if a conditional forfeiture was set aside on payment of cost or a final judgment was rendered in a case where the defendant plead guilty after being re-arrested, would he be entitled to $12.00 plus $6.00 or $7.00 which ever applied? Would he not also be entitled to cost in the forfeiture case, that is the case against the defendant and bondsmen, which is a different case.

"3. Title 11, Sec. 89(2): Would your answer be the same in this section as the above except for the amounts involved?

"4. Title 45, Sec. 69. (Fees payable by State) For each case where the defendant is sentenced to hard labor and takes an appeal to the Court of Appeals and case is affirmed $20.00; for each case where the defendant is sentenced to the penitentiary and appeals to the Supreme Court or the Court of Appeals and the case is affirmed $30.00. Would not the clerk be entitled to $10.00 plus $20.00 or $15.00 plus $30.00, which ever the case might be? Would this same opinion apply in criminal cases in the county court, law and equity court or court of like jurisdiction? I know that it was intended to include both fees but would like for you to clarify it for us.

"I would also like for you to clarify this: For making, indexing and certifying the transcript of appeal on the record only, $10.00, when the case is appealed to the court of appeals, for checking indexing, arranging and certifying the court reporter's transcript of testimony, $15.00. Would we not be entitled to this in addition to the other fees allowable.

"What fees would the clerk be entitled to if the Court of Appeals or Supreme Court reversed the decision of the lower court and it had to be retried, but not appealed again?

"I would appreciate a reply as soon as possible so that I may let the clerks and registers know what your opinion is."

In addition, I have your letter of November 5, 1958, in which you present one other question pertaining to the schedule of cost and fees for the circuit clerks. You ask that I consider this latter question as a part of your former request as to this subject and your letter of November 5 is as follows:

"Under Title 11, Sec. 89, Code of Ala. 1940, 1955 Cum. Supp. 'For recording indictments and making certified copies thereof, under sections 252 and 256 of Title 15, to be taxed as part of the costs in the case .25' Would the clerks still be entitled to this .25 in addition to the set fee per case? Act No. 543 1957 legislature amended this section, but did not mention the above fee. It is also a duty required under another section of code."

The inquiries set out in your request for opinion pertain to the newly established schedule of costs and fees which become applicable to the clerks of the circuit courts of this state as of January 20, 1959. This new schedule was enacted by the Alabama Legislature during the 1957 session and there are four acts of this body which are pertinent to this subject. These are: Act No. 542, Acts of 1957, page 762; Act No. 543, Acts of 1957, page 764; Act No. 740, Acts of 1957, page 1169 and Act No. 741, Acts of 1957, page 1170. A more detailed discussion of each of such acts would perhaps be helpful at this point.

Act No. 542, supra, amends Title 45, Section 69 of the Code of Alabama 1940, and makes provision for the items of cost taxed for the benefit of the circuit clerks which will be paid from state funds whenever a defendant is convicted and sentenced to the penitentiary, or is convicted and sentenced to hard labor, or whenever the sentence is suspended and defendant is put on probation as provided by law. Act No. 543, supra, amends Title 11, Section 89 of the Code of Alabama 1940, and prescribes a schedule of set fees payable to clerks of the circuit courts in criminal cases. Act No. 740, supra, amends Title 11, Section 21 of the Code of Alabama 1940, and prescribes a schedule of fees payable to clerks of the circuit courts in civil cases. Act No. 741, supra, provides for a fixed amount of costs for clerks of circuit courts who are ex-officio clerks of county courts, law and equity courts and courts of like jurisdiction in criminal and quasi-criminal cases. All of the above acts, with the exception of Act No 740, supra, have direct application to the inquiries which you have presented.

In your first question you inquire as to the fee to which the clerk would be entitled if a defendant is tried for an offense constituting a felony and found not guilty. As I have indicated previously, Act No. 543, supra, in amending Title 11, Section 89, supra, prescribes a schedule of set fees payable to clerks of the circuit courts in criminal cases. Reference to the provisions of this act indicates that in each felony case when the defendant pleads not guilty the clerk is entitled to have taxed for his benefit a set fee of $18.00. From the verbiage of your question, I am sure that you refer to a case in which the defendant, being tried for a felony, enters a plea of not guilty and that there is a subsequent finding of not guilty. In such a circumstance the clerk would be entitled to the set fee of $18.00 mentioned above. Likewise, as pointed out in your inquiry, such amount would be payable to the clerk out of either the fine and forfeiture fund of the county or the general fund if such fine and forfeiture fund has been merged with the general fund in the particular county concerned.

Your second question relates to those situations and cases in which there arises occasion for forfeiture of bail of the defendant. You make reference to the provisions of Act No. 543, supra, pertinent to such situation, and inquire as to whether or not the clerk would be entitled to the fees applicable to forfeiture cases as well as the fees pertaining to the trial of the criminal case concerned. In my judgment, such is the case

as I feel that there are two cases here involved and that the clerk would be entitled to the two set fees provided therefor according to the circumstances.

The pertinent portion of Act No. 543, supra, is that which provides " . . . for each conditional judgment on a forfetiure set aside on payment of costs, six dollars; for each forfeiture case after final judgment, seven dollars." In my opinion, a clerk should receive for his services in such a case the fixed fee provided for by Act No. 543, supra, depending on the circumstances pertaining to the particular trial and, in addition thereto, if there be a forfeiture in the case, the clerk should also receive the fixed fee provided for by that portion of Act No. 543, supra, above quoted. Here again, the amount to which the clerk would be entitled would be dependent upon the circumstances of the forfeiture. That is, whether there was a conditional judgment set aside on payment of costs or whether there was a forfeiture involving final judgment. From your inquiry, I gather that you might be of the opinion that the clerk would be entitled to fees over and above the two set fees which I have mentioned. If this be your thinking, I must advise that I do not feel that there would be other fees to which the clerk would be entitled but, rather, that the clerk should receive the two set fees mentioned above, that is, a set fee for disposition of the criminal case against the defendant and the set fee provided for by Act No. 543, supra, with relation to those criminal cases wherein forfeiture of bail becomes necessary.

In your third question you make reference to what are now the provisions of Act No. 741, supra, and inquire as to whether or not my answer to the previous inquiry would be the same under the circumstances provided for by such act with the exception of the amount involved.

As I have pointed out, Act No. 741, supra, provides for a fixed amount of costs in criminal and quasi-criminal cases for clerks of the circuit courts who are ex-officio clerks of inferior courts. As I have noted in giving answer to your second question, it is my opinion that a clerk performing services under the conditions set out in Act No. 741, supra, would be entitled to the set fee provided by such act for the disposition of the criminal or quasi-criminal case involving the defendant and, in addition thereto, if there be a forfeiture involved, the clerk would be entitled to the set fee of $7.50 provided for by this act in all forfeiture cases. The act first sets out a schedule of set fees, varying in amount and depending upon the condition of each trial, and then makes provision for the set fee of $7.50 in all forfeiture cases. In my opinion, a clerk would be entitled to the fee provided for by law for disposition of the criminal or quasi-criminal case and, likewise, the $7.50 provided as a fee in all forfeiture cases. It is my further judgment that this would be all the fees the clerks would be entitled to in such cases and that they should not receive other and additional fees for services in the forfeiture involved.

Your fourth inquiry involves several questions, all of which seem to

relate to the matter of the amounts payable from the funds of the state under the situation you have set out. You first inquire as to the amount payable from state funds in the event the defendant is sentenced to hard labor and takes an appeal to the Court of Appeals and the case is affirmed or either the defendant is sentenced to the penitentiary and appeals to the Supreme Court or the Court of Appeals and the case is affirmed.

In my judgment, answer to this inquiry is found in the provisions of Act No. 542, supra, amending Title 45, Section 69, Code of Alabama 1940, wherein it is provided that " . . . for each case where the defendant is sentenced to hard labor and takes an appeal to the court of appeals and the case is affirmed, twenty dollars; for each case where the defendant is sentenced to the penitentiary and appeals to the supreme court or the court of appeals and the case is affirmed, thirty dollars." From your inquiry I gather that you are, perhaps, of the opinion that in addition to this set fee provided for in the above-quoted portion of Act No. 542, supra, the clerk would receive from state funds an additional fee of either $10.00 or $15.00, depending upon whether the offense concerned is a misdemeanor or felony, allowable in those cases where the defendant is sentenced and no appeal is taken.

I do not feel such to be the case, and I am of the opinion that the clerk would only receive from state funds a twenty-dollar fee or a thirty-dollar fee provided for in the above-quoted portion of Act No. 542, supra, depending upon whether or not the defendant is sentenced to hard labor or whether or not the defendant is sentenced to the penitentiary. In either event, if the appeal is to the Court of Appeals or the Supreme Court and the case is affirmed, the clerk would receive from state funds either the twenty-dollar fee or the thirty-dollar fee. I do not feel that the clerk would likewise receive from state funds the fee provided for by this act applicable to those cases in which no appeal is taken. I must, therefore, advise that under the circumstances set out in your fourth question the clerk would only receive from state funds the set fee of either $20.00 or $30.00, depending upon the circumstances of each case and the appeal thereof.

Considering next your inquiry concerning the cost payable to the clerk from state funds in those cases tried in and appealed from inferior courts in which the clerk of the circuit court serves as ex-officio clerk thereof, I would advise that a somewhat different situation seems to exist. Making reference to the provisions of Act No. 542, supra, it will be found that in such cases tried in the inferior courts above referred to the state will pay, in proper cases, from state funds the set fee provided for by this act, the amount being dependent upon the conditions existing. It is further provided that in addition to this set fee ". . . when the case is appealed to the court of appeals, for making, indexing, and certifying the transcript of appeal on the record only, ten dollars; when the case is appealed to the court of appeals, for checking, indexing, arranging and certifying the court reporter's transcript of testimony, fifteen dollars." In my opinion, under proper conditions, the clerk might receive from

state funds this latter fee in those cases wherein such is applicable. If such appeal is taken on the record only, the clerk would receive from state funds the $10.00 fee provided for. If on the other hand, such appeal is on the record with transcript of testimony included, the clerk would receive from state funds an additional fee of $15.00, making a total of $25.00 which he would receive with reference to the appeal in such a case. As I have noted, this would be in addition to the set fee provided for the trial of the case prior to appeal. It should be noted that my latter remarks are addressed solely to those cases tried in and appealed from inferior courts in which the circuit clerk serves as ex-officio clerk thereof. They do not have application to those cases appealed from the circuit court for, as I have pointed out, in these latter cases the set fee of $20.00 or $30.00, depending upon the circumstances of the appeal, would be applicable.

I should also point out, for the sake of clarity, that there is a distinction between the fees to which the clerk would be entitled under the various acts which I am here considering and the amounts which would be payable from state funds under any given set of circumstances. You will note that under the provisions of Act No. 543, supra, in criminal cases disposed of in the circuit court, the clerk is entitled to a set fee for services rendered in such cases and, in addition thereto, a set fee for preparing and certifying any appeal which might be taken in such cases. If the costs are paid by the defendant and not from funds of the state, I feel that the clerk would be entitled, under these circumstances, to both of such set fees, one for trial and one for preparing the appeal. However, if the costs be paid from funds of the state, the clerk would only receive the one set fee provided for by Act No. 542, supra, this being either $20.00 or $30.00, depending upon the nature of the appeal.

You likewise inquire as to the fees to which the clerk would be entitled if the Court of Appeals or Supreme Court reverses the decision of the lower court and the case is retried, but not appealed again.

Here again, there is a distinction between the amount to which the clerk would be entitled if the defendant paid the costs in the case and the amount which is payable from funds of the state. Act No. 543, supra, sets out a schedule of fixed fees to which circuit clerks are entitled for services redered in the trial of criminal cases in the circuit court and in preparing and certifying appeals to our appellate courts. Under this schedule of fees a clerk would be entitled to receive from a defendant, if such defendant pays cost in a case, the full amount due him under the schedule set out. This would include a set fee for trial of the case and a set fee for the certification and preparation of any appeal taken therein. If the appellate court reversed such case and it was again tried in the circuit court, the clerk would be entitled to receive, should the defendant pay the cost, the set fee provided for trial of the case a second time. However, reference to the provisions of Act No. 542, supra, as they relate to the amounts payable to a clerk from state funds in those cases appealed from the circuit court, will reveal that the payment of such amount

is contingent upon such case being affirmed in the appellate court. In the situation which you have presented wherein the case was reversed by the appellate court, I do not believe that the clerk would receive from state funds the set fee provided for by Act No. 542, supra. Of course, if it were retried and again appealed and then affirmed, he would receive the one set fee provided for with reference to the case which was affirmed. If the defendant pays the cost in either of the cases, the clerk would be entitled to the full amount allowed him by the schedule of set fees provided by Act No. 543, supra.

In your letter inquiry which you have asked that I include herein, you make reference to the provisions of Title 11, Section 89, Code of Alabama 1940, as it existed prior to amendment by Act No. 543, supra: You point out that prior to amendment this statute made provision for the payment of a fee of 25 cents for recording indictments and making certified copies thereof under Sections 252 and 256 of Title 15. You further point out that no such provision is found within Act No. 543, supra, as it amends Title 11, Section 89, supra, and you inquire as to whether or not the clerks would still be entitled to this twenty-five-cent fee in addition to the set fees provided for by Act. No. 543, supra. It is my opinion that the clerks would not be entitled to such fee as it is completely omitted from Title 11, Section 89, supra, in its present form and, therefore, must be considered as being included within the set fees provided for by this amended statute.

I trust that the above answers to your inquiries will be of some help to you and the members of your association.

Very truly yours,

MacDONALD GALLION
Attorney General

February 3, 1959

Honorable David M. Cochrane
Judge of Probate and Ex-Officio
President of the Board of Revenue
Tuscaloosa County
Tuscaloosa, Alabama

Counties—Agriculture and Industries—Farmers.

County governing bodies authorized to appropriate money to purchase land to be used as curb market by county farmers for purpose of promoting agriculture, under the provisions of Title 12, Section 12(22), Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560.

Opinion by Assistant Attorney General Dillon.

Dear Sir:

The request of your predecessor in office for an official opinion, bearing date of December 9, 1958, is as follows:

"Re: Request for Opinion as to whether the Board of Revenue of Tuscaloosa County, Alabama, would be authorized to make an appropriation of $3,000.00 for the purchase of a property by a non-profit corporation to be used as a Curb-Market.

"We have in Tuscaloosa County an association incorporated under the provisions of Sections 115 - 113, Title 2, Code of Alabama of 1940, under the name of Tuscaloosa Farmer Market Association. This incorporated association has an option to purchase a plot of land in Tuscaloosa County for the sum of $3,000.00, and this association has requested the Board of Revenue of Tuscaloosa County, Alabama, to appropriate the said sum of $3,000.00 so that the property may be bought in the name of the incorporated association. Representatives of the association state that they desire to use the said property as a curb market for residents of Tuscaloosa County engaged in the production of agricultural products, subject to the rules and regulations of the incorporated association.

"We would appreciate it very much if you would answer for us the following questions:

"1. Would it be legal for the Board of Revenue of Tuscaloosa County, Alabama, to appropriate the sum of $3,000.00 for the purpose of purchasing a plot of land for the said incorporated association, the title to be taken in the name of the incorporated association?

"2. In the event your answer to Question 1 is in the negative, would it be legal for the Board of Revenue of Tuscaloosa County, Alabama, to appropriate the sum of $3,000.00 for the purchase of the land involved, the title to be taken in the name of Tuscaloosa County, Alabama, and lease the property to the said incorporated association for a considerable length of time at a nominal rent.

"This matter was referred to the County Attorney for his opinion, and it was his opinion that the Board of Revenue of Tuscaloosa County, Alabama, did not have the authority to make this appropriation. However, at the request of representatives of the incorporated association, we are requesting this opinion of you.

"We would appreciate it very much if you would let us have your opinion on these questions at your earliest convenience."

The applicable statutory law, covering your question, is found in Title 12, Section 12(22), Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560. The applicable statutory provision of Title 12, Section 12, supra, reads as follows:

> "22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision.

This statutory provision gives the county governing body a very wide range of authority in the appropriation of funds to aid the growth, promotion and expansion of argriculture in the several counties of this State. See Quarterly Report of Attorney General, Vol. 46, page 127, and Quarterly Report of Attorney General, Vol. 53, page 185.

This office has specifically held that the Board of Commissioners of Madison County had the authority to build a market house for the use of the farmers of Madison County, in selling their produce. Biennial Report of Attorney General, 1934-36, page 201.

It is, therefore, my opinion that if the Board of Revenue of Tuscaloosa County deems it advisable, and to the best interests of the agricultural development of Tuscaloosa County, said Board may, under the authority of Title 12, Section 12(22), supra, appropriate the sum of $3,000.-00, for the purpose of purchasing a plot of land for the Tuscaloosa Farmers Market Association, a non-profit incorporated association, for use as a curb market by resident of Tuscaloosa County, engaged in the production of agricultural products, title to said land to be taken in the name of the non-profit incorporated association.

The provisions of Title 12, Section 12(22), supra, gives the county governing body the power to contract with any person, firm, corporation, or association to carry out the purposes of said section.

I suggest that the county governing body consider the advisability of contracting with the Tuscaloosa Farmer Market Association that in consideration for the $3,000.00 appropriated for the purchase of said property, the association agree that in the event said land ceases to be used for the purpose for which the appropriation is made the land be conveyed to Tuscaloosa County, or the $3,000.00 appropriated for the purchase thereof, be refunded to Tuscaloosa County.

Very truly yours,

MacDONALD GALLION
Attorney General

February 3, 1959

Hon. W. S. Furlow
Sheriff of Pike County
Troy, Alabama

Sheriffs—Costs and Fees.

Certain items of fees, compensation and allowances provided for in Act No. 571, General and Local Acts 1955, page 1243, approved September 9, 1955, which did not become effective immediately upon the passage and approval of said act, do become effective at the beginning of the new term for sheriffs (January 20, 1959), and the sheriff is entitled to receive compensation under the said new schedule of fees when he performs services on or after January 20, 1959.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1959, is as follows:

"I would like your opinion on the following, about the new Sheriff's fees which went into effect Jan. 20th.

"Cases which are being held or bound over to the grand jury and will not be docketed by the Circuit Clerk until after the indictment is returned, would the old or new fees apply?"

In my opinion the new schedule of fees for sheriffs in criminal cases applies when the service that the sheriff performs is performed on or after January 20, 1959.

Act No. 571, General and Local Acts 1955, page 1243, amended Title 11, Section 100, Code of Alabama 1940, providing for a schedule of fees for sheriffs in criminal cases. Section 3 of Act No. 571, supra, provides that the act should become effective immediately. However, in an opinion of this office under date of November 22, 1955, addressed to Hon. R. R. Shields, Sheriff of Pickens County, Alabama, which opinion is found in Quarterly Report of Attorney General, Vol. 81, page 43, this office held that certain increased fees, compensation or allowances provided for in said Act No. 571 were not presently applicable, whereas other provisions of said act providing increased fees, compensation or allowances were presently (September 9, 1955) applicable. This office further held that the fees, compensation or allowances provided for in Act No. 571, supra, which were not then applicable would be applicable at the beginning of the new term for sheriffs in January, 1959.

I am of the view that sheriffs are entitled to receive fees, compensation and allowances under the new schedule of fees (Act No. 571, supra) when they perform services described in the new schedule on or after the beginning of the new term of office (January 20, 1959).

It would follow that services performed by the sheriff prior to January 20, 1959 would be governed by the old schedule of fees.

Very truly yours,

MacDONALD GALLION
Attorney General

February 5, 1959

Honorable Leo A. Townsend, Chairman
Board of Equalization
County of Mobile
Court House
Mobile, Alabama

Taxation—Ad Valorem Taxes—Timber—Assessments.

When timber is owned by the same person who owns the soil, it is not subject to separate taxation but the value thereof would be taken into consideration by the tax assessor and the board of equalization in placing a reasonable fair market value upon the reality for ad valorem taxation.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1959, is as follows:

"During the several years that the Board of Equalization of Mobile County has been making an inventory of the County land and improvements for the purpose of equalization, the appraisers have not taken into account agricultural, horticultural crops or growing timber in their appraisals.

"A question has arisen regarding growing timber, making it necessary that we have an official opinion on the subject. It seems to us that the question would be 'Is growing timber, when both timber and land are of the same owner, subject to ad valorem tax in Alabama.'

"Thanking you to furnish us this information as promptly as possible, we are"

I understand from your question that you desire to know whether or not timber is subject to ad valorem tax when the timber and land are owned by the same person. Timber is subject to ad valorem tax when its ownership thereof is by persons other than the ownership of the surface or soil. If the same owner owns both the land and the timber, the board would take the fact that the land is timbered land into consideration in placing the value upon the realty. In other words, standing timber is a part of the realty. We think that this position is made perfectly clear by the provisions of Title 51, Sections 21 and 46, Code of Alabama 1940. Section 21, supra, so far as here pertinent, reads as follows:

"The subject of taxation, except as exempted by law, shall be as follows: (a) Every piece, parcel, tract or lot of land in this state, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral, the right to mine minerals; timber, and the right to turpentine; oil or petroleum, natural gas and the right to remove same from the soil, or any other interests when such interests are owned by persons other than the owner of the surface or soil, except growing crops."

The above answer is also borne out by Section 46, supra, which, in its entirety, reads as follows:

"For the purpose of assessment, real and personal property shall be estimated at its fair and reasonable market value, according to the best judgment of the assessor, the board of equalization and agents of the department of revenue can form upon information, inspection or otherwise, taking into consideration all elements or factors bearing on such value as heretofore authorized; mineral, coal, oil, gas, timber and turpentine interest when they have been severed in ownership from the soil, by sale or otherwise, shall be separately valued and assessed."

It will be observed that this section specifically provides that timber, when it has been severed in ownership from the soil by sale or otherwise, shall be separately valued and assessed by the tax assessor and the board of equalization, but that standing timber, when not in some way severed in ownership from the soil, is part of the realty and would not be valued separately but its value would be taken into consideration in placing a reasonable fair market value on the realty for taxation.

Very truly yours,

MacDONALD GALLION
Attorney General

February 25, 1959

Honorable Roy O. Hill
Clerk
Circuit Court of Houston County
Dothan, Alabama

Clerks of Circuit Courts—Costs and Fees.

1. The only portion of Title 11, Section 87, Code of Alabama 1940, which is repealed by Act No. 741, Acts of 1957, page 1170, is that portion of such statute which deals with the costs and fees allowed the circuit clerk who serves as the ex-officio clerk of the county court.

2. The provisions of Title 11, Section 87, Code of Alabama 1940, which relate to the costs and fees allowed the circuit clerk while serving as the ex-officio clerk of the county court are now superseded by Act No. 741 Acts of 1957, page 1170.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of February 5, 1959, is as follows:

"Please refer to Acts of Alabama, Regular Session 1957, Vol. II, on page 1170, wherein Section 2 reads as follows:

" 'The provision of Section 87, of Title 11, Code of Alabama, 1940, AND all laws and parts of laws, general, special or local, in conflict with this Act are herby repealed.'

"Until yesterday, there was no doubt whatsoever in my mind that this repealed Section 87 of Title 11, but, in conversation with the Examining Department yesterday, I was advised that they are holding that the costs as listed in said Section are not repealed because they are not in conflict with any other law. It is my idea that all of said section is repealed plus other laws in conflict.

"We have been charging all the costs in this Section when applicable and I don't think they should be charged after this Act goes into effect on January 19th.

"Please advise me as soon as possible if Section 87 is repealed or if I should continue to charge these fees when applicable."

In your letter of January 6, 1959 addressed to my predecessor in office, and set out above, you make inquiry concerning the provisions of Act No. 741, Acts of 1957, page 1170. You specifically ask as to whether or not such act repeals all or a portion of the provisions of Title 11, Section 87, Code of Alabama 1940.

Act No. 741, mentioned above, is an act which provides for a fixed amount of costs for clerks of the circuit courts who are ex-officio clerks of county courts, law and equity courts and courts of like jurisdiction in Alabama in criminal and quasi-criminal cases. This particular act was passed by the 1957 Legislature as one of a series of enactments pertaining to the costs and fees of the circuit clerks of this state. Section 2 of Act No. 741, supra, is as follows:

> "The provisions of Section 87 of Title 11, Code of Alabama 1940 and all laws and parts of laws, general, special or local, in conflict with this Act are hereby repealed."

You wish to know whether or not this repealer clause served to repeal, in their entirety, the provisions of Title 11, Section 87, Code of Alabama 1940

Reference to Title 11, Section 87, supra, discloses that this is a statute providing for those costs and fees taxable in prosecutions before the county court. Included within the provisions of this statute are fees which may be taxed for the benefit of the judge of the county court, for the sheriff of the county for services performed in the county court, for witnesses who appear as such in the county court, for solicitor's fee in such court, fees allowed the clerk of such court and a provision that certain of the items there taxable for the benefit of the judge and solicitor shall be payable to the county. As I have noted, Act No. 741, supra, has application solely to the costs taxed for the benefit of circuit clerks in criminal cases when such circuit clerk serves as ex-officio clerk of an inferior court. Such act in no wise affects those items of cost or fees allowable to the other officers of the court or to the county for services rendered in such inferior court. Act No. 741, supra, deals solely and explicitly with the cost allowable to the circuit clerk in criminal cases when he is serving as ex-officio clerk of an inferior court.

With these thoughts in mind and considering the repealer clause found as a part of Act No. 741, supra, in conjunction with the provision of Title 11, Section 87, supra, in their entirety, one can only arrive at the conclusion that those provisions of Title 11, Section 87, supra, which are repealed by Act No. 741, supra, can only be those provisions of Title 11, Section 87, supra, which relate to the cost and fees allowable to the ex-officio clerk of such court which are in conflict with the provisions of Act No. 741, supra. It would not be reasonable nor lawful to conclude that a repealer clause attached to an act dealing solely with costs and fees allowable to circuit clerks could serve to repeal or abolish fees formerly allowed by law to other officers of the court for services rendered there-

in. It obviously was not the intent or purpose of the Legislature in the passage of Act No. 741, supra, to amend other than the costs and fees allowable circuit clerks in the cases there set out. There is nothing to indicate that the legislative body felt that they were doing any violence or making any change to the costs and fees allowable other officers of the court. In fact, in view of the title affixed to Act No. 741, supra, any attempt to have altered otehr than the costs of circuit clerks in the cases there mentioned within the body of such act would have been in violation of Section 45 of the Constitution of Alabama 1901.

In view of the above, I am of the opinion that the only portion of Title 11, Section 87, supra, repealed by Act No. 741, supra, is that portion applying to the costs and fees allowed the clerk in county courts. This specific provision, which I consider to be supplanted by the provisions of Act No. 741, supra, is as follows:

" . . . The clerks of the circuit court who by law shall be made ex-officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court . . . . "

It is my opinion that the above-quoted provision is now superseded by Act No 741, supra, and that circuit clerks serving as ex-officio clerks of inferior courts should receive their costs and fees in criminal cases under the provisions of Act No. 741, supra.

Very truly yours,

MacDONALD GALLION
Attorney General

February 27, 1959

Hon. Harry H. Haden
Commissioner of Revenue
State of Alabama
Montgomery 2, Alabama

Taxation—Revenue, Department of—Words and Phrases.

1. So-called "pulpwood chips" which are cut or chipped from slabs or scrap removed from logs at the sawmill in the process of manufacturing lumber, and which are later converted into pulp and used in manufacturing paper or related materials, are "pulpwood" and are taxable as such under Act No. 169, General Acts 1945, page 285, the Forest Products Severance Tax Act.

2. The fact that the chips are sometimes sold by the ton instead of by the cord is immaterial, as the number of cords or parts of a cord in a ton of chips can be readily computed for the purpose of measuring the tax under Act No. 169, supra.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of February 12, 1959, is as follows:

"I would like to request your official opinion as to whether so-called 'pulpwood chips', which are cut from slabs removed from the sides of timber logs when such logs are manufactured into lumber, are taxable as pulpwood or otherwise under the Provisions of the Alabama Forest Products Severance Tax Act of 1945 (Gen. Acts 1945, pp. 285, et seq.).

"Converting the separate slabs or sides of the logs (not used in manufacturing lumber) into pulpwood chips is done by a special machine or chipper, and is a fairly recent process, but one that has grown into a large business. The general procedure in such cases is for the chips to be cut from the slabs at the sawmill. The chips after being cut are then shipped to the paper mill where they are converted into pulp which is used in making paper or other related materials. The process of converting the chips into pulp and manufacturing the pulp into paper is practically the same process as that used in cases where the pulpwood is purchased as cord wood or as small logs. The only difference is that sometimes the chips are purchased by the ton instead of by the cord. The wood purchased in the form of cord wood or small logs is also chipped, but this is done at the paper mill before such wood is converted into pulp.

"My question then is whether or not the 'pulpwood chips' when purchased as such, sometimes by the ton and sometimes by the cord, are taxable under the provisions of the Alabama Forest Products Severance Tax, and particularly under the provisions of Section 2 and 3 of the Act, which impose the tax on a wide variety of items produced from a tree including pulpwood, chemical wood and bolts.

"As your opinion in this respect will have general application, I would appreciate your writing it in official form and at your earliest convenience."

The wood chips to which you refer are obviously made out of slabs which are cut from the logs in the process of manufacturing lumber at the sawmill and are the scrap or residue which is left behind after the lumber is cut from the logs. The chips are made from the slabs by the use of a special machine called a chipper, which process usually takes place at the sawmill and before the chips are shipped to the paper mill.

After the chips are received at the paper mill they are converted into pulp, as a part of the manufacturing process of making paper, plastics or related materials.

Your question then is whether or not these chips are taxable as "pulpwood" or otherwise under the provisions of Act No. 169, General Acts 1945, page 285, which is generally referred to as The Forest Products Severance Tax Act.

Section 2 of Act No. 169, supra, which is the levying section reads in material part, as follows:

> "To provide further for conservation of the natural resources of the State by protection of the forest products and the development of the forestry program, there is hereby levied, and shall be collected as herein provided, a privilege tax on account of the business activities shown upon every person engaging or continuing to engage in the State in the business of severing timber or any other forest products from the soil, for sale, profit or commerical use whether as owner, lessee, concessionaire or contractor . . . ." (Emphasis added)

Section 3 of the Act specifically designates that lumber logs shipped out of the State in an unmanufactured condition, pulpwood, chemical wood and bolts, among several other items, are to be subject to the tax, and also provides the measure of the tax on these various items. "Pulpwood" is said to be taxable at the rate of 6 cents a standard cord of 128 cubic feet. "Lumber" is taxable at a different rate, and is placed in an entirely different category from "pulpwood". Moreover, by clearly designating such a large number of items in this section, this appears to show a positive intent on the part of the Legislature to include within the scope of the tax practically all parts of a tree. This also seems to be in full keeping with the intent of the Act as is manifested in its title, which is to levy a tax to be used in conserving the natural resources of the State and to preserve its timber and other forest products taken from the soil.

The usual conception of "pulpwood" as the word is generally defined in practically all of the dictionaries is substantially the same as it is defined in Webster's New International Dictionary, 2nd Ed., page 2010:

> "The soft wood of certain trees, mostly spruces and aspens, used in making paper."

It will be noted that there is no requirement that pulpwood be cut in any particular shape or size. No matter what the shape of the wood is, if it is converted into pulp in the process of making paper or related materials, it is pulpwood. **U. S. v. Pierce**, 147 F. 199, 201; Words and Phrases, Permanent Edition, Vol. 35, p. 456.

The so-called pulpwood chips, the subject of your inquiry, appear to

clearly fall within the definition of "pulpwood" as they are eventually converted into pulp and used in manufacturing paper and related materials, and the slabs involved are chipped for such purpose. In fact, it is my understanding that all pulpwood has to eventually be chipped before it is converted into pulp.

The fact that the chips are sometimes sold to the paper mill on a tonnage basis would not appear to make any material difference as it is a matter of simple mathematics to compute the number of standard cords or parts of such cords in a ton of wood. Therefore, the tax can be readily computed as directed by Section 3 of the Act, even though the chips are sometimes sold by the ton.

There is no question here of double taxation as the slabs are not considered when the amount of board feet of lumber cut from the logs is computed for the purpose of measuring the tax on the lumber. This is true regardless of whether the number of board feet of lumber in a log is computed on the basis of lumber tally or is estimated by the Doyle Rule, or one of the other recognized log scale rules, as only the number of board feet of lumber is considered. Thus, the slabs cut from the logs and out of which the pulpwood chips are made, being residue or surplus material, are not considered in measuring or estimating the amount of lumber in the logs. The slabs then out of which the chips are made are separate from the lumber and as "pulpwood" the chips would be taxed in a different category from the lumber.

The answer to your question is in the affirmative, and to the effect that said pulpwood chips are taxable as "pulpwood" within the meaning of Act No. 169, supra.

Very truly yours,

MacDONALD GALLION
Attorney General

March 4, 1959

Hon. L. B. Stephens
Executive Director
Board of Pardons and Paroles
State of Alabama
Montgomery 5, Alabama

Pardon, Parole and Probation—Judges—Solicitors.

Under the provisions of Act. No. 599, General Acts 1951, page 1030 (Title 42, Section 16, 1955 Cumulative Pocket Part, Code

of Alabama 1940), no pardon may be granted except with the written approval of the circuit judge who tried the prisoner's case, or in the event the judge be dead or no longer serving with the written approval of either the present serving circuit solicitor or a circuit judge in the circuit where the prisoner was convicted.

Opinion by Assistant Attorney General Proctor.

Dear Sir:

Your request for an official opinion, bearing date of February 24, 1959, is as follows:

"The State Board of Pardons and Paroles has asked that I request your official interpretation of the following portion of Title 42, Section 16, Code of Alabama 1940, as amended by Act No. 599, Acts of Alabama 1951, page 1035.

"'And no pardon shall be granted unless the prisoner has successfully completed at least three years of permanent parole, or until the expiration of his sentence, if his sentence was for less than three years, except upon the unanimous affirmative vote of the board following receipt and filing of clear proof his innocence of the crime for which he was convicted, and the written approval of the judge who tried his case, or circuit solicitor or with the written approval of a circuit judge in the circuit where he was convicted, if the judge who tried his case be dead or no longer serving.'

"The Board has pending before it a case in which there is proof of innocence of the crime for which the prisoner was convicted. The judge who tried the case was defeated for re-election but before his term expired was made supernumerary. The solicitor was also defeated in his race for reelection.

"Under the statute above referred to which of the following has the legal authority to approve this pardon when it is granted by the Board; the judge who tried the case, who is no longer serving but is a supernumerary judge; the solicitor who tried the case, who is no longer serving; the present judge of the circuit where the prisoner was convicted and the present solicitor of the circuit where the prisoner was convicted?"

The answers to your questions involve an interpretation of the following portion of Section 16 of Act No. 599, General Acts 1951, page 1030 (Title 42, Section 16, 1955 Cumulative Pocket Part, Code of Alabama 1940):

" . . . and the written approval of the judge who tried his case, or

circuit solicitor or with the written approval of a circuit judge in the circuit where he was convicted, if the judge who tried his case be dead or no longer serving. . . ."

To arrive at an interpretation of the act as passed, it is helpful to note that when the bill was originally drafted by the Senate, the words "or circuit solicitor" were omitted and the phrase read as follows:

" . . . and the written approval of the judge who tried his case, or with the written approval of a circuit judge in the circuit where he was convicted, if the judge who tried his case be dead or no longer serving. . . ."

It is my opinion that under the act as originally drafted, approval would have had to come from the judge who tried the case if he was still serving. However, if this judge was dead or no longer serving, then the written approval would have had to come from some other judge in the circuit where the prisoner was convicted.

At the request of the Senate Judiciary Committee, the original draft of the act was changed to insert the words "or circuit solicitor." Considering the present act with its original drafting in mind, it is my opinion that these words "or circuit solicitor" are modified by the phrase "if the judge who tried his case be dead or no longer serving." Therefore, if the judge who tired the case is living and serving, only he can give the written approval, but if the judge who tried the case is dead or no longer serving, then the written approval must come from either the circuit solicitor or a circuit judge in the circuit where the prisoner was convicted.

I am of the further opinion that the term "circuit solicitor" refers to the present serving circuit solicitor and not necessarily the one who tried the case. Also, the term "no longer serving" means no longer serving as a circuit judge in the circuit where the man was convicted. The fact that the judge who tried the case is now a supernumerary judge would not make him eligible to approve the pardon.

Premises considered, it is my opinion under the facts presented in your letter that the written approval must come from either the present serving circuit solicitor or a circuit judge in the circuit where the man was convicted.

Very truly yours,

MacDONALD GALLION
Attorney General

March 5, 1959

Honorable Harry H. Haden
Commissioner of Revenue
Department of Revenue
Montgomery 2, Alabama

Bonds—Sureties—Revenue, Department of—Taxation.

1. An "official bond", executed by a surety company authorized to write official bonds in Alabama, is not required under the provisions of Title 51, Section 670, Code of Alabama 1940, as to the collection of the gasoline tax by a licensed distributor.

2. A surety bond executed by a surety company duly authorized to do business in this State will also meet the requirements of the bond provisions of Act No. 664, General Acts 1939, page 1050 (Mileage Tax Act) and also Act No. 590, General Acts 1939, page 958 (Diesel Fuel Tax Act), and an "official bond" is not needed.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of February 9, 1959 is as follows:

"Your official opinion is requested as to whether a person responsible for reporting and paying over to the State Department of Revenue the gasoline tax, the diesel fuel tax, and the milage tax is required to post with the Department an 'Official Bond', under the provisions of the respective Acts and particularly the sections thereof which relate to the posting of surety bonds.

"Some of the surety companies who are not qualified to write official bonds in this State are contending that under the statutes involved an official bond is not needed and that a surety bond made on the regular form is sufficient to meet the requirements, if made by a surety company licensed and duly qualified to do business in this state.

"Subsection (d) of Section 647, as amended, Title 51, Code of Alabama 1940, provides that the gasoline tax is to be levied and collected as follows:

" 'Every distributor, refiner, retail dealer, or storer of gasoline shall add the amount of the excise tax levied and assessed herein to the price

of the gasoline, it being the purpose and intent of this provision that the tax levied is in fact a levy on the consumer or user with distributor, refiner, retail dealer, or storer, or in the case of a licensed user, acting merely as an agent of the state for collection and payment of the tax to the state.' (Emphasis supplied)

"Section 670, as amended, Title 51, Code of Alabama 1940 contains the requirements as to the posting of bonds under the gasoline tax Act and provides in material part as follows:

"'The bond shall be in such form and amount as may be approved by the commissioner of the department of revenue, shall be executed by a surety company licensed and duly authorized to do business in Alabama, shall be payable to the State of Alabama, and be conditioned upon the prompt filing of true reports, and the payment by the applicant to the department of revenue of any and all excise taxes accrued or accruing on the sale, distribution or withdrawal from storage of gasoline which may now or may hereafter be levied or imposed by the State of Alabama, together with all penalties and interest thereon, and generally upon faithful compliance with the provisions of this article.' (Emphasis supplied)

"The same section also provides that in lieu of a guaranty bond, the applicant may post Alabama State Bonds under the terms, rules and regulations as may be approved by the Department of Revenue.

"Chapter 2, Article 1 of Title 41, Code of Alabama 1940, contains the general provisions relating to official bonds, and Section 33 of Title 41 requires, among other things, that the official bond of every state official, agent or employee must be filed with the Secretary of State. "Unlike the gasoline tax which is said to be 'a levy on the consumer', the Diesel Fuel Tax Act and the Mileage Tax Act do not expressly make the person responsible for reporting and paying the tax over to the State, a State agent. These two taxes appear to be required to be paid to the State by the taxpayer himself.

"There are no specific requirements under the bond provisions of the Diesel Fuel Tax Act or the Mileage Tax Act which would require the posting of an 'Official Bond'. Section 665 (14) of Title 51, Pocket Part, Code of Alabama 1940 is the applicable section of the Diesel Fuel Tax Act and Section 301 (50) of Title 48, Pocket Part, Code of Alabama 1940, contains the bond requirements of the Mileage Tax Act. "In an informal opinion dated December 22, 1958 and addressed to Mrs. Mary J. Thompson, Executive Secretary, Real Estate Commission, your office ruled that an "Official Bond" made by a surety Company qualified to make such bonds in Alabama, was not required under Title 46, Section 311 (5), Code of Alabama 1940, as to the Real Estate Brokers license issued by the State Real Estate Board. The license there involved was issued under the police powers of the State, and the bond required was for the benefit of the public in dealing with

real estate brokers which appears to have presented a somewhat different question from those here presented under said taxing statutes.

"I would appreciate an early response to this request as these matters are of immediate concern to the Revenue Department."

An "official bond" is defined in Black's Law Dictionary, Third Edition, page 235, as follows:

"A bond given by a public officer, conditioned that he shall well and faithfully perform all the duties of the office. The term is sometimes made to include the bonds of executors, guardians, trustees, etc."

After considering this definition together with the provisions of Title 41, Chapter 2, Article 1, Code of Alabama 1940, which Article relates to official bonds, I do not believe that an official bond is required to be made in the case of a licensed gasoline distributor under the provisions of Title 51, Section 670, Code of Alabama 1940.

The type of agent designated in Title 51, Section 647(d), as amended, Code of Alabama 1940, for the purpose of collecting the gasoline tax for the State is a very limited and special one, and such an agent, in my judgment is not an officer or agent as is contemplated in Title 41, Section 33, Code of Alabama 1940. Under Section 670, supra, all that appears to be required in this respect is a surety bond made by a surety Company duly authorized to do business in Alabama.

Unlike the gasoline tax, the mileage tax which is levied under Act No. 664, General Acts 1939, page 1050 and the diesel fuel tax which is levied under Act No. 590, General Acts 1939, page 958 are to be reported and paid over to the State Department of Revenue by the taxpayer himself, and but for the fact that these extractions are made under the taxing powers of the Legislature rather than the police powers, their bond requirements are much the same as the bond requirements relating to the real estate brokers license, which requirements were the subject of the opinion of this office addressed to Mrs. Mary J. Thompson, Executive Secretary, Real Estate Commission, dated December 22, 1958. In that opinion this office held that the bond was not required to be made by a surety Company qualified to write official bonds in this State, but was sufficient if made by a surety Company duly qualified to do business in this State. This conclusion would also appear to apply equally as well to the surety bonds required to be made under Act No. 664 and Act No. 590, supra. All that is expressly required in this respect under these Acts is that the bond be executed by a surety Company which is duly authorized to do business in Alabama.

An "official bond," then is not required under the bond provisions of the three tax Acts to which you have referred in your inquiry.

Very truly yours,

MacDONALD GALLION
Attorney General

March 10, 1959

Hon. Macon L. Weaver
Solicitor
23rd Judicial Circuit of Alabama
Huntsville, Alabama

Pardon, Parole and Probation—Costs and Fees—Sheriffs.

Sheriff's fees for arresting and returning probationer under interstate compact paid in same manner as if arrest made within the State of Alabama.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of February 12, 1959, is as follows:

"I would like your honorable opinion on the following questions. May the sheriff of any county of the State of Alabama going to a foreign state and returning a prisoner who is on probation in such state from the State of Alabama under the terms and conditions of Inter-state compact, be reimbursed for his expenses in making such a trip and in the same manner as he would be reimbursed if he went to such state to pick up a prisoner who had waived extradition back to the state of Alabama.

"Title 45, Code of Alabama, 1940, as amended, Section 5 states that any provisions of law to the contrary notwithstanding allowances, cost and fees of officers of court and of state witnesses including the arrest for delinquent probationers upon order of the court or probation officer and witness fees for witnesses subpoenaed by the state to appear before the Judge and give testimony relating to the delinquent of any probation, any case in which sentence is suspended and defendant put on probation, shall be paid in the same manner and from the same fund or from the same sources as if no suspension or execution of sentence had intervened.

"In the 1957 supplement to the Code of Alabama 1940 as amended, Title 15, Section 75, we find an amendment which states that in cases where notices received in this state from authorities in another state that if the prisoner has been arrested for another crime committed in this state and the sheriff of the county in which said crime was committed goes to the state for foresaid and the person for foresaid consents to return with said sheriff without requisition from the Governor, said Sheriff shall be entitled to the fees and expenses now provided by law for requisitions issued. This section shall apply to

the felonies and misdemeanors alike whether there be a conviction of the person apprehended or not.

"Under the inter-state compact agreement, a person who is to be placed upon probation in a state other than the State of Alabama must first sign a waiver of extradition and the receiving state must agree to supervise this person while on probation. Then if that person commits a crime or does an act whereby the authorities in the State of Alabama declare the probation revoked, it is then incumbent upon the Sheriff to go to such state and return the parole violator to the State of Alabama. We have had several such cases arise in Madison County and we have no answer as to the method in which the sheriff can be reimbursed. It has been my contention that in the light in the two preceding sections set out in this letter that the sheriff would be reimbursed the same as if a prisoner waived extradition and without an extradition warrant from the Governor issuing. The local probation officer, Mr. Cooper Frazier, has just handed me a communication from Mr. L. B. Stephens, Executive Secretary, the State Board of Pardons and Paroles in Montgomery, Alabama in which he answers the question as follows: Refer to your memo of February 5th. The Sheriff is entitled to his expenses of returning a probationer from out of state providing the conviction was for a felony even though he does not obtain extradition from the Governor, however, he definitely cannot be paid for a guard to accompany him without securing the Governor's request papers, in which papers, the Governor authorizes a guard.

"Now specifically the question which we would like to have answered is as follows: May the Sheriff of Madison County, Alabama go to the state of Colorado for the purpose of returning a person who committed a crime in the State of Alabama and placed upon probation and sent to Colorado under the inter-state compact agreement, the prisoner first having signed a waiver of extradition, and his probation having now been revoked by the Circuit Court of Madison County, Alabama, and being reimbursed for his entire expenses the same as if he went to Colorado to return a person wanted in the State of Alabama who had waived an extradition and in neither case gone through the procedure of having the Governor issuing extradition papers."

Title 42, Section 25, as amended, Code of Alabama 1940, provides:

"Any provision of law to the contrary notwithstanding, allowances, costs and fees of officers of courts and of state witnesses, including arrest fees for delinquent probationers upon order of the court or probation officer, and witness fees for witnesses subpoenaed by the state to appear before the judge and give testimony relating to the delinquency of any probationer in any cases in which sentence is suspended, and the defendant put on probation, shall be paid in the same manner and from the same funds or sources as if no suspension

of execution of sentence had intervened. The clerk of the court, in addition to the usual fees now allowed him by law in criminal cases, shall be allowed a fee of one dollar in each case for his services in keeping a probation docket and one dollar for forwarding the probation file in duplicate to the board of pardons and paroles, all of which fees if not paid by the probationer shall be payable out of the funds of the state department of corrections and institutions as other such court costs are now paid."

Title 42, Section 27, Code of Alabama 1940, provides for the automatic waiver of extradition process when a probationer is sent to another state under the provisions of the interstate compact. This compact treats those cases as separate and distinct from fugitive cases and provides, in effect, for extraterritorial authority for the arresting officer from the sending state. The probationer, unless he leaves the state to which he was probationed, is, therefore, not a fugitive from justice in the sense that is required in order to put into operation Title 15, Section 75, as amended, Code of Alabama 1940.

It is, therefore, my opinion that the fees of the Sheriff would be collected in the same manner as if the probationer were to be arrested within the State of Alabama, i. e., the fees of the Sheriff for executing the warrant of arrest and returning the prisoner, if not previously imposed upon the probationer by the court as condition precedent to probation, are payable by the Comptroller through a supplemental cost bill. Quarterly Report of Attorney General, Vol. 43, page 40, and Quarterly Report of Attorney General, Vol. 46, page 143, providing for payment by Department of Corrections and Institutions, have been expressly overruled by Act No. 558, Acts of Alabama 1957, Regular Session, Page 777.

Very truly yours,

MacDONALD GALLION
Attorney General

March 12, 1959

Honorable W. R. Stuart
Probate Judge
Baldwin County
Bay Minette, Alabama

License Inspectors—Penalties

1. The term of a license inspector does not expire with that of the Governor, for under the provisions of Title 51, Section 835, as amended, Code of Alabama 1940, license inspectors

are appointed by the State Department of Revenue, and they hold office at the pleasure of that Department.

2. Under the same Code section license inspectors who are paid on a fee basis are lawfully entitled to all penalties paid by delinquent licensees while they are in office.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of February 12, 1959, is as follows:

"Does a License Inspector, who is appointed by the Governor, term of office expire with the Governor.

"I am anxious for this information since the License Inspector has gotten very active since January 19th, and in making our report, we will have to know whether the penalty goes to the hold-over license inspector or should the penalty go to the State."

The appointment of a license inspector is governed by the provisions of Title 51, Section 835, as amended, Code of Alabama 1940, which reads in material part, as follows:

"The department of revenue is hereby authorized and empowered to appoint a license inspector for each County provided that the same person may be appointed for more than one County, except as otherwise provided by law . . . ." (Emphasis Supplied)

Section 835, as amended, supra, then expressly provides that license inspectors are to be appointed by the State Department of Revenue, and strongly implies that they are to serve at the pleasure of the State Department of Revenue. This appears to be particularly the case as this office has previously ruled in an opinion reported in Quarterly Report of Attorney General, Volume 31, page 31, that license inspectors are not under the Merit System. The State Department of Revenue then being the appointing authority would also have the authority to terminate the employment of a license inspector at its pleasure, as the license inspector would have no rights under the Merit System or classified service.

You are, therefore, advised that the employment of a license inspector is not terminated merely by a change in Governors, as the license inspector in office would continue to serve until his employment is terminated by the State Department of Revenue, or he resigns of his own accord. Your first question then is answered in the negative.

Under the provisions of Title 51, Section 835, as amended, Code of

Alabama 1940, the penalties collected from delinquent licenses should be paid to the license inspector in office at the time the penalty is collected. The only exception to this is where the license inspector is on a salary instead of being paid on a fee basis. Where the license inspector is on a fee basis, he is lawfully entitled to the penalties which are paid while he is in office, regardless of whether or not he personally cites the delinquent licensee, or whether a citation was served on such licensee. Quarterly Reports of the Attorney General, Vol. 6, page 108 and Vol. 46, page 157.

Your second question is answered then to the effect that as a matter of law the fifteen per cent penalty accrues to the license inspector in office at the time of the payment of such penalty. Furthermore, subsection (c) of Section 835, as amended, supra, expressly forbids the issuance of a delinquent license without the payment of said fifteen per cent penalty.

The disbursement of the penalty differs from the disposition to be made of the citation fee. The right to the citation fee grows out of personal service, and the license inspector is entitled to the citation fee only when he personally serves the citation on the delinquent licensee. Quarterly Report of the Attorney General, Vol. 20, page 7 and Vol. 46, page 157.

The term of a license inspector then does not expire with that of the Govenor, and he is entitled to all of the penalties which are paid by delinquent licensees while he is in office.

Very truly yours,

MacDONALD GALLION
Attorney General

March 13, 1959

Hon. John R. Phillips
Attorney for Sheriff of
Calhoun County
Anniston, Alabama

Prisons and Prisoners—Sentences—Corrections and Institutions, Department of.

1. Good behavior is authorized for county hard labor convicts and penitentiary convicts only.

2. The provisions of the good behavior statute must be put

into effect and carried out by the Director of the Department of Corrections and Institutions.

3. By order of the Director, under the provisions of Title 45, Section 255, Code of Alabama 1940, as amended, (Act No. 534, Acts of 1943) the provision of the good behavior statute for county hard labor convicts shall be carried out by the Court of County Commissioners or Board of Revenue.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing the date of February 23, 1959, is as follows:

"As Attorney for Sheriff of Calhoun County, Alabama, a question has arisen in the Sheriff's office which I would like to have your opinion on.

"Under a new act passed by the Legislature, short term prisoners with six months or less time to serve are allowed to serve this time in the County Jail.

"In connection with this new act, the Sheriff would like to know if these prisoners are allowed time off from their sentence on good behavior. In other words, I would like to know what rule is to be followed in computing the time the prisoner must serve in the County Jail.

"The Sheriff would also like to know if he needs authority from the County Board Commissioners to release said prisoners when they have served their sentence with allowance off for good behavior."

Title 45, Section 253, Code of Alabama 1940, as amended, (Act No. 836, Acts of Alabama 1953) provides for good behavior time for county hard labor convicts and penitentiary convicts only. Title 45, Section 255, Code of Alabama 1940, as amended, (Act No. 534, Acts of Alabama 1943) provides in pertinent part as follows:

"The provisions of this Act shall be put into effect and carried out by the Director of the Department of Corrections and Institutions ..."

County hard labor convicts would, therefore, be released normally by order of the Director of the Department of Corrections and Institutions upon proper request and certification as to good behavior by the County Commissioners or Board of Revenue. Quarterly Report of Attorney General, Vol. 37, page 75. However, in view of Act No. 61, Acts of Alabama 1957, the Director has recently put forth a directive to all Courts

of County Commissioners and Boards of Revenue under date of March 11, 1959, which reads in pertinent part, as follows:

> "In consideration of Act No. 61, Acts of Alabama 1957, and pursuant to the authority and duty vested in me by Title 45, Section 255, Code of Alabama 1940, as amended (Act No. 534, Acts of Alabama 1943), I hereby direct you to deduct from the sentence of all county hard labor convicts, under your supervision and control, that time authorized by Title 45, Section 253, Code of Alabama 1940, as amended (Act No. 836, Acts of Alabama 1953)."

It is, therefore, my opinion that the release of such hard labor convicts may now be effected by the Court of County Commissioners or Board of Revenue, whichever is applicable. So much of that opinion reported in Quarterly Report of Attorney General, Vol. 37, page 75, and so much of those informal opinions dated March 27, 1958, to Hon. Lawrence F. Gerald, Jr., Deputy Solicitor, Chilton County; June 30, 1958, to Hon. H. Harrison Hill, Clerk, Circuit Court, Morgan County, and December 1, 1958, to Mr. Milford S. Dean, Chief Clerk, Records and Identification, State Board of Corrections, in conflict herewith are expressly modified to conform with this opinion.

Very truly yours,

MacDONALD GALLION
Attorney General

March 18, 1959

Hon. Carl E. Sellers
Judge of Probate
Houston County
Dothan, Alabama

Deeds—Judges of Probate—Mortgages—Records.

Where written request is made for satisfaction of mortgage record in office of the Judge of Probate, entry of satisfaction by mortgagee's attorney in fact need not be attested, provided such attorney in fact files of record a properly executed and acknowledged power of attorney, under Title 47, Section 178, Code of Alabama 1940.

Opinion by Assistant Attorney General Mentz.

Dear Sir:

Your request for an official opinion bearing date of March 6, 1959, is as follows:

"In compliance with **Code of Alabama 1940, Title 47, Section 178,** it has been necessary in the past to enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust. Such entry has been witnessed by the judge of probate or his clerk. The question has now risen as to whether or not the last sentence in the above cited section which reads as follows: 'Or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances and filed for record, which entry need not be attested. Such entry operates as a release of the mortgage or deed of trust, and is a bar to all suits thereon at law or in equity.', makes it unnecessary for the satisfaction on the margin of the record to be attested.

"We are familiar with **Reports of Attorney General of 1936-1938, page 107,** which states as follows: 'There is no valid satisfaction of mortgage as provided by this section without attestation by Judge of Probate or his clerk.'

"We are also familiar with **Reports of Attorney General, 1922-24, page 441** which states as follows: 'Any entry of satisfaction made under this section whether made in person or by attorney in fact must be attested by the Probate Judge or his clerk.' We are familiar with Reports of Attorney General, 1928-30, page 810 which states as follows: 'An attorney in fact could occupy no higher ground than his principal and there could be no reason given for requiring the act of the principal to be witnessed and not require the same of the attorney in fact when acting for the principal.'

"In view of the above citations it has been called to our attention that all of these opinions of the Attorney General were rendered relative to the Section 9023 of the Code of Alabama, 1923, and that the last sentence added by the 1940 Code now makes it unnecessary for the Probate Judge or his clerk to attest the agent's acts. We would appreciate your opinion as to whether or not an attorney in fact may satisfy mortgages recorded in this office without having his signature attested as provided by the section above set out."

Section 9023, Code of Alabama 1923, reads:

"If a mortgage or deed of trust which is of record has been fully paid or satisfied, the mortgagee or transferee or assignee of the mortgage, or trustee or cestui que trust of the deed of trust, who has received payment or satisfaction, must on request in writing of the mortgagor,

or of a judgment, or other creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, or owner of the lands mortgaged, or a junior mortgagee, or of the debtor in a deed of trust, enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust. Such entry must be witnessed by the judge of probate, or his clerk, who, in his official capacity, must attest said satisfaction; or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances, and filed for record. For making such attestation the judge of probate is entitled to a fee of twenty-five cents. Such entry operates a release of the mortgage or deed of trust, and is a bar to all suits thereon at law or in equity."

Title 47, Section 178, Code of Alabama 1940, reads:

"If a mortgage or deed of trust which is of record has been fully paid or satisfied, the mortgagee or transferee or assignee of the mortgage, or trustee or cestui que trust of the deed of trust, who has received payment or satisfaction, must on request in writing of the mortgagor, or of a creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, or owner of the lands mortgaged, or a junior mortgagee, or of the debtor in a deed of trust, enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust. Such entry must be witnessed by the judge of probate, or his clerk, who, in his official capacity, must attest said satisfaction, and for making such attestation the judge of probate is entitled to a fee of twenty-five cents. Or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances and filed for record, which entry need not be attested. Such entry operates as a release of the mortgage or deed of trust, and is a bar to all suits thereon at law or in equity."

It will be noted that in Section 178, supra, after the provision, "Or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances and filed for record," there is added the clause, "which entry need not be attested."

In a prior opinion, this office stated that Section 178, supra, is a penal statute and must be construed strictly; that said statute applies only to those cases where the mortgagor, or a creditor of the mortgagor having a lien or claim on the property mortgaged, or a purchaser from the mortgagor, or the owner of the lands mortgaged, or a junior mortgagee, or the debtor in a deed of trust, requests in writing that the mortgage record be satisfied; and, further, that where the mortgagee or transferee or assignee of the mortgage or trustees or cestui que trust of the deed of trust satisfies the mortgage record through an attorney in fact and such attorney in fact files of record a properly executed and acknowledged power of attorney,

it is not necessary, under said statute, for the satisfaction to be attested. Quarterly Report of Attorney General, Vol. 25, page 33.

In keeping with the foregoing, it is my opinion that an attorney in fact may satisfy a mortgage recorded in the office of the Judge of Probate without having his signature attested by the Judge of Probate, or his clerk, acting in his official capacity, provided the other specified requirements and conditions of Section 178, supra, have been met.

Very truly yours,

MacDONALD GALLION
Attorney General

March 23, 1959

Hon. R. C. (Red) Bamberg
Commissioner
Department of Agriculture and Industries
State of Alabama
State Office Building
Montgomery 1, Alabama

Agriculture and Industries—Fines—Opinions Overruled, Modified and Distinguished.

1. Fines imposed for violations of Title 2, Sections 384-392, as amended, Code of Alabama 1940, should be deposited into State Treasury for use of Agricultural Fund.

2. Quarterly Report of Attorney General, Vol. 17, page 57, distinguished.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Your request for an official opinion bearing date of February 26, 1959, is as follows:

"I shall appreciate it if you will give me an official opinion as to whether fines levied under Section 390 of Title 2 of the Code of Alabama of 1940 for violations of Sections 384-392, as amended, should be deposited into the State Treasury to the credit of the Agricultural Fund or whether such fines should be deposited into the County Treasury.

"Some question has arisen relating to the disposition of fines imposed

for violations of the above-mentioned law, which is sometimes referred to as the 'Hare Anti-Cattle Rustling Law'. We understand that fines levied under the penalty provision of this law should be deposited into the State Treasury to the credit of the Agricultural Fund, however, on several occasions Court Clerks have contended that such fines should be paid into the County Treasury and they base such contention upon an official opinion by the office of the Attorney General addressed to this Department rendered several years ago under date of October 10, 1939, which may be found in Quarterly Reports of the Attorney General (Oct.-Dec. 1939) Volume 17, page 57."

It is my opinion that amounts collected as fines for violations of the statute referred to in your inquiry should be deposited into the State Treasury to the credit of the Agricultural Fund.

The statute referred to in your inquiry which you state is sometimes referred to as the "Hare Anti-Cattle Rustling Law" appears as Sections 384-392, Article 23, Chapter 1 of Title 2, Code of Alabama of 1940, as amended, and the penalty provision of this law appears under Section 390, thereof, which declares that violations are a misdemeanor. The penalty section or other provisions of this law do not provide for the disposition of amounts collected thereunder as fines.

The Agricultural Fund of the State Treasury exists pursuant to Section 31, Article 4, Chapter 1 of Title 2, Code of Alabama of 1940, and this section, as pertinent to your inquiry, provides:

"Sec. 31. Agricultural Fund. Wherever provision is made in this chapter for the collection of any fee or license or the imposition of any fine or penalty for the violation of any provision of this chapter without providing for the disposition of the proceeds derived therefrom, such proceeds shall accrue to the agricultural fund. . . ." (Emphasis added)

The foregoing statute which provides for the agricultural fund expressly declares that wherever provisions are made in this chapter (Chapter 1, Title 2, Code of Alabama of 1940) for the imposition of any fine or penalty for violations of any of the provisions of the chapter, unless otherwise provided, shall be deposited into the State Treasury to the credit of the Agricultural Fund. The statute to which you refer in your inquiry appears under Chapter 1 of Title 2, supra, therefore, amounts imposed as fines or penalties for violations thereof must be deposited to the credit of the Agricultural Fund as no requirement to the contrary appears in Sections 384-392 of Title 2, supra. This conclusion is in harmony with a former opinion of this office relating to fines collected for violations of another law appearing in Chapter 1 of Title 2, Code of Alabama 1940. See Quarterly Report of Attorney General, Vol. 53, page 154.

You state that some question has arisen relating to the disposition of these fines and it has been contended that such fines should be deposited

into the County Treasury under authority of an opinion of this office addressed to your Department under date of October 10, 1939, Quarterly Report of Attorney General, Vol. 17, page 57. The opinion to which you refer does rule that amounts collected as fines for violations of Act No. 190 of the Legislature of 1936, approved April 21, 1936, Acts of 1936, page 222, (Hare Anti-Cattle Rustling Law) should not be paid into the Agricultural Fund as such amounts should be paid into the County Treasury. Although that opinion construes the same law here under consideration, such opinion was promulgated prior to the adoption of the Code of Alabama of 1940. The opinion is correct as such fines should have been paid into the County Treasury by virtue of statutes applicable prior to the adoption of the Code of 1940, however, since the adoption of the Code such fines should be paid into the State Treasury to the credit of the Agricultural Fund because of the requirements of Section 31 of Title 2, supra, which created the Agricultural Fund. Prior to the effective date of the Code of Alabama of 1940 fines collected for violations of the Hare Anti-Cattle Rustling Law were not subject to the requirements of this Section, therefore, that opinion may be distinguished from the conclusion reached herein for the reason that the adoption of the Code of Alabama of 1940 changed the law to require the deposit of such fines into the Agricultural Fund. See **State vs. Towery, et al.**, 143 Ala. 48, 39 So. 309; **Gibson vs. State** 214 Ala. 38, 106 So. 231.

Yours very truly,

MacDONALD GALLION
Attorney General

March 23, 1959

Honorable John C. Curry
Superintendent of Banks
State Banking Department
CAPITOL

Banks and Banking.

Under Constitutional Amendment LI, Constitution of Alabama 1901, banks are not required to extend charters nor does Superintendent of Banks have authority to approve extension of charter.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of March 13, 1959 is as follows:

"By Constitutional Amendment LI, amending Section 251 of the Constitution, proclaimed ratified November 17, 1944 (Proclamation Record, Volume F, p. 379), it is provided:

" 'Section 251. There shall be no limit of time for the duration of a corporation hereafter organized as a bank or banking company, and it shall not be necessary hereafter to renew or extend the life or charter of any such corporation now existing. And all extensions of the life or charter of any such corporations are hereby ratified and confirmed.'

"Notwithstanding this Amendment, the sections of the Code of 1940 providing for the extension of bank charters, Sections 97 and 98, Title 5, have not been repealed.

"One of the State banks operating under the supervision of this Department has from time to time had the life of its charter extended for twenty year periods, the last such extension being granted in 1939 to expire June 30, 1959.

"The attorneys for the bank referred to have insisted that the bank be permitted to follow the provisions of Sections 97 and 98, Title 5, and obtain the endorsement of the Superintendent of Banks as provided in Section 98.

"This Department has taken the position that since the adoption of Amendment LI, above quoted, the filing of the proceedings as provided for in Section 98 of Title 5 is not required and that the approval by the Superintendent of any such proceedings would, by implication, be contradictory of the Constitutional provision set forth in said Amendment.

"In view of this situation we ask your opinion upon the following questions.

"1. Since the adoption and ratification of Amendment LI to the State Constitution is it necessary for a State bank in existence at the time such Amendment was adopted and ratified and operating under a valid charter or a validly extended charter, to obtain a further extension of charter in accordance with the provisions of Sections 97 and 98 of Title 5 of the Code of Alabama of 1940?

"2. If your answer to question 1 is in the negative, does the Superintendent of Banks have the right to approve the certificate of extension as provided in Section 98, supra, if such a certificate is filed, notwithstanding the fact that it is no longer required?

"3. If your answer to question 1 is in the negative, does the Superintendent of Banks have the right to approve the certificate of extension for perpetual duration, if such a certificate is filed?"

My answer to your first question is that an extension of the charter is unnecessary.

Constitutional Amendment LI, amending Section 251 of Constitution of Alabama 1901 provides:

> "Section 251. There shall be no limit of time for the duration of a corporation hereafter organized as a bank or banking company, and it shall not be necessary hereafter to renew or extend the life or charter of any such corporation now existing. And all extensions of the life or charter of any such corporation are hereby ratified and confirmed."

"The State Constitution, however, is a limitation upon legislative power. . . ." Biennial Report of Attorney General 1928-1930, page 861.

Research fails to disclose any construction of Amendment LI, Constitution of Alabama 1901, by the Supreme Court. In my opinion Amendment LI, supra, is self-executing, and your department should refrain from extending corporate existence of banks either for a term of years or for perpetual duration.

My answer to your second and third inquiry, therefore, is in the negative.

Yours very truly,

MacDONALD GALLION
Attorney General

March 24, 1959

Honorable Roy Downs
Chairman
Shelby County Hospital Board
Calera, Alabama

Taxation—Ad valorem Taxes—Exemptions—Counties.

A plant or factory, having been exempt from taxation under Title 51, Section 3, as amended, Code of Alabama 1940, is exempt from the four-mill hospital tax subsequently levied by said County.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion bearing date of March 2, 1959, is as follows:

"On May 21, 1953, the American Brake Shoe Company filed its application for exemption from taxation as provided by Section 3, Title 51, of the Code of Alabama 1940, as amended by an act of the Legislature of Alabama approved on July 11, 1951, and as amended by an act of the Legislature approved on July 17, 1951. It was stated in said application that the construction of applicant's plant would be substantially completed before the end of 1954. Thereupon, on August 10, 1953, The Board of Revenue and Control of Shelby County, Alabama, granted said exemptions. The proceedings above stated appear in the record I am presenting to you.

"On September 27, 1954, a Resolution was adopted by The Board of Revenue and Control of Shelby County, Alabama, reciting that application had been made to it for authority to incorporate a public corporation for hospital purposes in Shelby County, Alabama, and that said application had been filed with the Board and a copy was set out in the minutes of said meeting. The Resolution declared that it would be wise, expedient and necessary that said corporation be established for the purpose of owning and operating a public hospital and other health facilities in Shelby County, Alabama, and that it should be organized and that the persons signing the application would become the incorporators. These facts are set out in the minutes of the Board of September 27, 1954, hereto attached.

"On the 17th day of November, 1954, the certificate of incorporation of said Hospital Board was filed and recorded in the Probate Office of Shelby County, Alabama.

"On April 9, 1956, the Board of Revenue and Control adopted a Resolution calling an election to be held on the 29th day of May, 1956, for the purpose of determining whether a 4-mill tax should be levied for the purposes therein recited, in connection with the Hospital.

"The election was held and on June 11, 1956, the results of said election was ordered to be spread upon the minutes of the Board of Revenue and Control, from which it appears that in said election 2726 votes were cast, and of that total 1955 were cast for the proposed taxation and 771 against it, thereby declaring that the tax was authorized by a majority vote in said election.

"As shown by minutes of a meeting of the Board of Revenue and Control of Shelby County, Alabama, held on February 25, 1957, it appears that the original certificate of incorporation of the Hospital Board was never approved by The Board of Revenue and Control, but

this was done on February 25, 1957, as shown by minutes hereto attached.

"On March 11, 1957, as shown by minutes of The Board of Revenue and Control, Resolution was adopted electing the members of the Board of Directors of the Hospital Board, and other matters therein recited.

"The Shelby County Hospital Board, ... desires your opinion on whether or not American Brake Shoe Company and other corporations obtaining exemptions from taxation as provided by Section 3, Title 51 of the Code of Alabama as amended by acts of the Legislature thereafter approved, are exempt from the 4-mill tax levied for the support and maintenance of said public hospitals. The question has been raised by the American Brake Shoe Company as to whether or not it is liable for the 4-mill hospital tax levied for said purpose.

"You will observe that the American Brake Shoe Company was granted exemption on August 10, 1953, as provided by Section 3 of Title 51 as amended. The Shelby County Hospital Board was incorporated later as shown by exhibits attached to this letter. The Brake Shoe Company contends that the exemption from taxation granted prior to the creation of the Shelby County Hospital Board covers the 4-mill hospital tax thereafter levied and being now collected.

"Quite a number of tax exemptions were granted to various corporations under this provision, and, of course, if one is exempt they all would be exempt.

"The first levy of the 4-mill tax was made for the year 1957 and is levied annually thereafter. . . ."

From the foregoing facts we observe that you desire to know whether or not the American Brake Shoe Company and other corporations which have obtained exemptions from taxation as provided by Title 51, Section 3, as amended, Code of Alabama 1940, are exempt from the said 4-mill tax levied for the support and maintenance of said public hospitals. It is well to note that the said American Brake Shoe Company was granted exemption from all taxation on August 10, 1953, as provided by said Section 3 with the exceptions contained in Section 3 and that the Shelby County Hospital Board was incorporated subsequent to the grant of exemptions to said American Brake Shoe Company and that the said Company is contending that the exemption from taxation granted prior to the creation of the Shelby County Hospital Board covers or includes the 4-mill hospital tax thereafter levied and which is now being collected. On August 4, 1958, this office answered said inquiry in a letter to Honorable W. K. McDowell, Tax Assessor of Choctaw County, Butler, Alabama, as follows:

"This will acknowledge receipt of your letter of June 23, 1958 with re-

spect to resolution of the Board of Commissioners of Choctaw County dated March 5, 1956, a copy of which was enclosed. You wish advice as to whether or not Marathon Southern Corporation is exempted from the special four mills ad valorem tax for the purpose of constructing, maintaining and operating a public hospital in your county.

"Clearly under the resolution of the Board of Commissioners the Marathon Southern Corporation is exempted 'from all ad valorem taxes assessed for all county purposes, except taxes for county school and school district purposes, for a period of ten (10) years. . . .' This includes exemption from the special four mills ad valorem tax levied for the construction and maintenance of a public hospital subsequent to the date of said resolution. See **Pullman Car & Mfg. Corp. of Alabama v. Hamilton**, 236 Ala. 209, 181 So. 244.

"Accordingly your question is answered in the affirmative."

The following Attorney General opinion and opinions of our Supreme Court are either directly in point or at least persuasive: Quarterly Report of Attorney General, Volume 16, page 202, **Pullman Car and Manufacturing Corporation v. Hamilton**, 229 Ala. 184, 155 So. 616; **Crow, Tax Collector, v. General Cable Corporation**, 223 Ala. 611, 137 So. 657.

I am, therefore, of the opinion that the exemptions granted American Brake Shoe Company cover the said four-mill hospital tax, and that it is, therefore, exempt therefrom.

Very truly yours,

MacDONALD GALLION
Attorney General

March 30, 1959

Hon. G. H. Stacy
Judge of Probate and Chairman of the Court
of County Commissioners of Bibb County, Alabama
Centerville, Alabama

Convicts—Hard Labor—Prisoners—Counties—Gasoline and Gasoline Tax—Gasoline Fund.

1. Sections 74-105 of Title 45, Code of Alabama 1940, as well as all laws of the State and rules of the Department of Corrections concerning penitentiary convicts are applicable to county convicts.

2. Convicts not sentenced to hard labor for the county may be used only for janitorial work and similar services in and around the county jail but hard labor convicts may be used to work on any of the county buildings or other county works.

3. County Superintendent of Public Works, hired pursuant to Title 45, Section 86, Code of Alabama 1940, may be paid one-half of his compensation from gasoline funds if one-half of his time is devoted to supervision of the county road work.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of March 5, 1959, is as follows:

"Act No. 61, General Acts of Alabama 1957, Vol. 1, Page 100 repealed Sections 96, 97 and 99 of Title 45, Code of 1940. Those were the sections of the Code under which the Counties had sent their county convicts (hard labor sentences) to the State to work out their sentence. Since the repeal of those sections that can no longer be done.

"It is our opinion that we must now keep, work, and use County Convicts under the terms and provisions of Article 4, of Title 45 of the 1940 Code which takes in Sections 74 to 90 inclusive of Title 45.

"You will notice Section 86, Title 45, Code of 1940, provides that if the county Commissioners determine to work the County convicts on the public roads, bridges or other public works they may appoint a superintendent of public works who shall receive such compensation as shall be fixed by the County Commissioners. The duties of the superintendent of public works are set out in Section 90, Title 45, Code of 1940.

"The Court of County Commissioners of Bibb County, Alabama, propose to adopt such resolutions and make and enter such orders as will effectively accomplish the following, to-wit: 1. To employ and appoint a superintendent of public works. 2. To fix his salary or compensation at the sum of $200.00 per month. 3. To work the county convicts a minimum of 50 per cent of their time on the public roads of Bibb County under the supervision of the superintendent of public works and the remainder of their time in and around the jail, courthouse and other public building of the county or in lieu thereof to work no less than one-half of the convicts on the public roads of the County all of the time and the remainder of them in and around the said County buildings. 4. To pay one half of the salary of the superintendent of public works out of Bibb County's share of the gasoline tax funds and the other one-half out of the general funds of the County. 5. To keep said convicts in the County jail at night and when they are not working.

"I, G. H. Stacy, Judge of Probate and Chairman of the Commissioners Court of Bibb County, Alabama, request your official opinion in answer to the following questions, to-wit: 1. Does the provisions of Article 4, Title 45, Code of 1940, control the method and manner of the holding, keeping, working and using the County Convicts of Bibb County, Alabama. 2. In the event of the Court of County Commissioners of Bibb County, Alabama, should adopt such resolutions and make and enter such orders as would effectively put into operation the above proposals from 1 to 5 inclusive would the same be legal and accord with the law made and provided to control such matters. If you state any one or more of such proposals would not be legal please give your reasons therefor.

"We do not at present have an effective system of handling the County Convicts in operation and feel that we should set up one at once, so we will deeply appreciate your reply as soon as possible."

The answer to your first question is in the affirmative. However, Article 4 is not exclusive and so much of Article 5, Title 45, Code of Alabama 1940, as has not been repealed by Act No. 61, Acts of Alabama 1957, is also controlling, as well as:

"All laws of the state and rules of the department in regard to state convicts shall apply also to county convicts as far as applicable, except as otherwise provided by law." Title 45, Section 74, Code of Alabama 1940.

To answer your second question, I must assume that you are referring to hard labor convicts only since imprisonment in the county jail does not automatically include hard labor for the county. **Thompson v. State**, 19 Ala. App. 328, 97 So. 258. Therefore, a person sentenced to confinement in the county jail could not be used for hard labor for the county but only for janitorial work and similar service in and around the county jail. On the other hand, a person sentenced to hard labor for the county could be used to work on any of the county buildings or other county works. Quarterly Report of Attorney General, Vol. 88, page 31.

With that assumption, Proposals 1, 2, 3 and 5 constitute a legitimate exercise of the county's authority under Articles 4 and 5 of Title 45, Code of Alabama 1940.

Proposal No. 4, however, presents a more difficult proposition. This office has previously ruled that members of the Board of Revenue of Shelby County, when acting under statutory authority as road supervisors, could be compensated from the gasoline funds (Quarterly Report of Attorney General, Vol. 4, page 139); the county engineer performing work necessary to the county roads and bridges could be paid from the gasoline fund (Quarterly Report of Attorney General, Vol. 2, page 215); the reasonable attorney fees in the acquisition of the right of way, a necessary incidental

expense to acquiring the right of way for a public road, could be paid from the gasoline fund (Biennial Report of Attorney General 1936-38, page 489); and that the reasonable cost of guards of convicts actually engaged in work on the county road system could be paid from the gasoline funds (Opinion to Hon. J. A. Logue, Chairman, Houston County Board of Revenue and Control, dated January 12, 1959).

However, it has also been held that a county may not expend the gasoline fund to support something which is otherwise provided for by other funds. Weaver v. Tidwell, 228 Ala. 169, 153 So. 218.

The test thus applied is that if the person to be paid out of the gasoline funds is necessary for authorized county road work, and if his salary is not otherwise provided for, he may be paid from the gasoline funds. I find no other provision for payment of the Superintendent of Public Works.

It is, therefore, my opinion that if your Superintendent is to be employed one-half of his time in supervising the road work of the convicts, then one-half of his compensation may be paid from the gasoline funds.

Very truly yours,

MacDONALD GALLION
Attorney General

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